Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

RHONDA BURKHART,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Tennessee

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Tennessee Code Annotated § 39-17-501 and § 39-17-505 are unconstitutionally vague as applied and on their face because they fail to provide fair notice that video gaming machines are prohibited "gambling devices."

2. Whether a statute can survive a constitutional vagueness challenge merely by requiring individuals to "steer far wide of the unlawful zone" whenever they are uncertain of the statute's scope.

3. Whether Tennessee Code Annotated § 39-17-501 and § 39-17-505 are unconstitutionally overbroad because they impinge on rights protected by the First Amendment of the United States Constitution.

LIST OF PARTIES

Petitioner Rhonda Burkhart was a defendant in the Circuit Court for Montgomery County 19th Judicial District, Clarksville, Tennessee, an appellee in the Tennessee Court of Criminal Appeals, and an appellant in the Supreme Court of Tennessee. The State of Tennessee, which was plaintiff in the Circuit Court for Montgomery County 19th Judicial District, Clarksville, Tennessee, appellant in the Tennessee Court of Criminal Appeals, and appellee in the Supreme Court of Tennessee, is the Respondent.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Tennessee entered in this case on October 10, 2001.

OPINIONS BELOW

The opinion of the Circuit Court for Montgomery County 19th Judicial District, Clarksville, Tennessee, entered on March 18, 1998, is unreported and is reproduced in the Appendix at App. 49. The opinion of the Tennessee Court of Criminal Appeals, entered on December 6, 1999, is unpublished and is reproduced in the Appendix at App. 17. The opinion of the Supreme Court of Tennessee, filed October 10, 2001, is reported at 58 S.W.3d 694 and is reproduced in the Appendix at App. 1.

JURISDICTION

The judgment of the Circuit Court for Montgomery County 19th Judicial District, Clarksville, Tennessee was entered on March 18, 1998. App. 49. The judgment of the Tennessee Court of Criminal Appeals was entered on December 6, 1999. App. 17. The judgment of the Supreme Court of Tennessee was filed on October 10, 2001. App. 1. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED

Relevant portions of the Tennessee statutes, Tennessee Code Annotated §§ 39-17-501 and 39-17-505, are reproduced at App. 63.

STATEMENT

On January 10, 1997, the Clarksville Police Department conducted an alcohol control inspection at the Pit Row Bar in Clarksville, Tennessee, which was owned by petitioner Rhonda Burkhart. In a locked room the officers found 6 electronic video "slot machine theme games" of the types called "Cherrymaster" and "Fever." The games were turned on but were not being used.

The machines are equipped to accept paper currency and coins. A player puts money into the machine and pushes a button; if the video screen displays a winning hand, the player wins credits for additional play. Unlike traditional slot machines, these machines cannot pay out any winnings as they have no mechanism to provide money, other than to refund money just inserted. The machines have buttons (called "knock-off switches") that when pushed will reset the game and erase the credits won so the next person would have to pay to play.

The officers did not observe anyone use the machines and found no evidence that the machines had been used to gamble. Nevertheless, the machines were confiscated and the owner of the Pit Row Bar, petitioner Rhonda Burkhart, was charged with possession of a gambling device in violation of Tennessee Code Annotated

§ 39-17-505, a class B misdemeanor punishable by up to 6 months imprisonment. The officers also found pinball machines, which allow a player to win free games, but these machines were not confiscated.

A. The Indictment and the Proceedings in the Trial Court.

Rhonda Burkhart was indicted on one count of possessing a gambling device in violation of Tennessee Code Annotated § 39-17-505. Section 39-17-505 of the Tennessee Code (hereinafter "section 505") provides, in pertinent part:

> [A] person commits an offense who knowingly owns, manufactures, possesses, buys, sells, rents, leases, stores, repairs, transports, prints or makes any gambling device or record. However, it is not an offense for a person to own or possess in this state a lottery ticket originating from a state in which a lottery is lawful, if such ticket is not owned or possessed for the purposes of resale.

App. 64. The reach of this provision is dictated by section 39-17-501 of the Tennessee Code (hereinafter "section 501"), which defines "gambling" and "gambling device" as follows:

> (1) "Gambling" means risking anything of value for a profit whose return is to any degree contingent on chance, but does not include a lawful business transaction; . . .
>
> (3) "Gambling device or record" means anything designed for use in gambling, intended for use in gambling, or used for gambling;

> (4) "Lawful business transaction," as used in subdivision (1); includes any futures or commodities trading;

App. 63.

Rhonda Burkhart filed a motion to dismiss the indictment on the grounds that Tennessee Code Annotated § 39-17-501 and § 39-17-505 ("Tennessee Gambling Act" or the "Act") are vague as applied because they fail to provide fair notice that video poker/slot machines are *per se* gambling devices; the Act is facially invalid because it leaves the description of gambling devices to the personal predilection of law enforcement officials; the Act's "lawful business transaction" exception violates the guarantee of equal protection because it excludes certain "gamblers" from prosecution; and the Act is impermissibly overbroad because it allows for the arrest of persons publishing and delivering a newspaper that contains information that is used to gamble.

B. The Decision of the Circuit Court of Montgomery County.

On January 9, 1998, the trial court conducted a preliminary hearing and on January 28, 1998, it dismissed the indictment. The court held, *inter alia*, that the Act's definitions of "gambling device" and "gambling" are impermissibly overbroad and unduly vague:

> [A]pplication of the definitions set forth at Tennessee Code Annotated §§ 39-17-501 regarding "gambling devices" and "gambling" and the resulting application of Tenn. Code Ann. § 39-17-505 is so overly broad and unduly vague

> in proscribing "gambling devices" that application of the criminal statute Tennessee Code Annotated § 39-17-505 constitutes a denial of equal protection of law and due process under the Constitution of the United States and the Constitution of the State of Tennessee. . . .

App. 50. As a result, the court concluded that "prosecution under this statute is constitutionally prohibited." App. 50.

C. The Decision of the Tennessee Court of Criminal Appeals.

The Tennessee Court of Criminal Appeals reversed. The Court of Criminal Appeals held, *inter alia*, that the Tennessee Gambling Act does not implicate any First Amendment rights and therefore is not unconstitutionally overbroad; that a facial challenge to the definition of "gambling device" is permissible, but the statute is not unconstitutionally vague as long as it is interpreted only to encompass devices principally designed for use in gambling based on the objective features that the manufacturer has incorporated into the device; and that the definition of gambling device is not vague as applied to video poker/slot machines because these types of machines were illegal *per se* under Tennessee's prior gambling law. App. 37-38. The court also rejected Rhonda Burkhart's equal protection challenge, holding that strict scrutiny is not applicable because the Act impinges only on the right to gamble and not the fundamental right of personal liberty. App. 45.

D. The Decision of The Supreme Court of Tennessee.

The Supreme Court of Tennessee granted review as to three of the issues petitioner raised in the Court of Criminal Appeals: (1) whether the Tennessee Gambling Act is vague as applied; (2) whether the Act is vague on its face; and (3) whether the Act is unconstitutionally overbroad.

The Supreme Court of Tennessee affirmed the judgment of the Court of Criminal Appeals, holding that the Act is not unconstitutionally vague as applied to Rhonda Burkhart because "she engaged in conduct that is clearly proscribed by the statutes." App. 12. The court stated that the definition of "gambling devices" is "sufficiently clear to provide notice that a slot machine is a gambling device." App. 6. The court went on to opine that

> [e]ven if uncertainty existed as to whether slot machines are gambling devices under Tenn. Code Ann. § 39-17-501, it is not "unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." *Boyce Motor Lines v. United States*, 342 U.S. 337, 340 (1952). A person who is aware of a possible application of the statute and nevertheless proceeds cannot complain of inadequate notice when arrested. Indeed, an uncertain meaning should lead to citizens "steer[ing] far wider of the unlawful zone" than if the statute were more precise in the use of its language. *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972).

App. 6 (alteration in original).

The court also held that because the Act is not vague as applied to Rhonda Burkhart's machines, "she may not successfully challenge the statutes as facially vague." App. 9. The court rejected petitioner's assertion that a lack of guidelines for law enforcement made discriminatory enforcement inevitable. Relying on this Court's decision in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982), the Tennessee Supreme Court stated:

> In this case, like *Hoffman Estates*, no evidence in the record suggests that the statutes have actually been enforced in an arbitrary or discriminatory manner. Burkhart offers several hypothetical situations to which the statute could be applied. However, "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). The statutes are sufficiently clear and objective as applied to the present situation. Burkhart's speculations, therefore, do not support a facial attack on the statutes.

App. 10.

Finally, the court held that the Act is not overbroad. The court rejected the notion that any constitutionally protected conduct is implicated by the provisions, noting that "[g]ambling or possessing a gambling device is not constitutionally protected conduct." App. 11.

REASONS FOR GRANTING THE WRIT

I. THE TENNESSEE GAMBLING ACT IS UNCONSTITUTIONALLY VAGUE AS APPLIED AND ON ITS FACE.

It is a fundamental tenet of our jurisprudence that "before a man can be punished as a criminal . . . his case must be 'plainly and unmistakably' within the provisions of some statute." *United States v. Gradwell*, 243 U.S. 476, 485 (1917). The principles that underlie this proscription are easily understood: due process requires that criminal statutes provide "fair warning" of what conduct is forbidden so that individuals may avoid such conduct and so that law enforcement and triers of fact are prevented from engaging in arbitrary and discriminatory enforcement of the criminal laws.

Although the Due Process Clause does not require absolute precision in the drafting of criminal statutes, it does require that fair warning be given "in language that the common world will understand." *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J.). The Tennessee Gambling Act fails to give fair warning to persons of common intelligence of its proscriptive breadth and allows for arbitrary and discriminatory enforcement of its provisions.

A. The Tennesse Gambling Act Fails To Give Fair Warning of What Is Prohibited.

A careful parsing of the provisions at issue demonstrates their vagueness. Section 505 provides, in part, that "[a] person commits an offense who knowingly owns,

manufactures, possesses, . . . or makes any gambling device or record." Tenn. Code Ann. § 39-17-505(a). To understand the reach of this provision, one must look to section 501, which broadly defines a "[g]ambling device or record" as "*anything* designed for use in gambling, intended for use in gambling, or used for gambling." Tenn. Code Ann. § 39-17-501(3) (emphasis added). "Gambling," in turn is defined in section 501(1) as "risking anything of value for a profit whose return is to any degree contingent on chance." This definition of "gambling" is just as vague as the definition of "gambling device."

Under the Act, "any degree" of chance is sufficient to bring an activity within the definition of gambling. If these terms were given their ordinary meaning, the Act would criminalize an unprecedented amount of conduct. For example, a person risks the entry fee (*i.e.*, something of value) when he or she enters an athletic tournament that uses a ball, bat, or racquet (*i.e.*, a device or record) in the hope of prize money (*i.e.*, a profit) awarded as a result of winning the tournament (*i.e.*, a result that is to some degree contingent on chance).[1] Presumably athletic events are not criminal, but such events fall within the definitions of "gambling" and "gambling device" in the Act. Indeed, several states with similar provisions

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[1] The impact of chance – or luck – in sports often is subtle. For example, the top seed in the finals of a tennis match could twist an ankle in the second set and be unable to complete the match. Although skill may have gotten the winning player to the finals, chance has played a roll in winning the champion's check.

expressly exclude "bona fide contests of skill, speed, strength or endurance" from the definition of "gambling." *See, e.g.*, Wyo. Stat. § 6-7-101(a)(iii)(A); N.D. Cent. Code 12.1-28-01(1)(a); Colo. Rev. Stat. § 18-10-102(2)(a).

Almost all human behavior is predicated on taking some risk, based on imperfect information, that the desired result will be achieved. As the Superior Court of Pennsylvania has noted:

> A peculiar combination of luck and skill is the *sine qua non* of almost all games common to modern life. It is hard to imagine a competition or a contest which does not depend in part on serendipity. It cannot be disputed that football, baseball and golf require substantial skill, training and finesse, yet the result of each game turns in part upon luck or chance.

Commonwealth v. One Electro-Sport Draw Poker Mach., 443 A.2d 295, 298 (Pa. Super. Ct. 1981), *rev'd on other grounds*, 465 A.2d 973 (Pa. 1983). Which activities are excluded – other than the specification of one lawful business transaction, futures and commodities trading – cannot be discerned from the Act except by speculation.

Furthermore, section 501(3) is stated in the disjunctive; proof of any of the three elements will suffice to bring the device within the statute's prohibition. *See* Opin. Tenn. Att'y Gen. No. 94-129 (Nov. 2, 1994), at 1 (reproduced in the Appendix at App. 53). According to the text of the statute and a Tennessee Attorney General opinion, possession of an item such as poker chips – even if used only for playing checkers – is a criminal violation of the Act. *Id.*; *see also* Opin. Tenn. Att'y Gen. No. U90-169 (Nov. 28, 1990), at 2 ("[A] device constitutes a gambling

device *per se* when designed to be used for gambling . . . [and] it is a gambling device regardless of a putative defendant's intent or action.") (reproduced in the Appendix at App. 58).

B. The Tennessee Gambling Act Allows for Arbitrary and Discriminatory Enforcement of Its Provisions.

The Tennessee Gambling Act is so deficient that it makes arbitrary and discriminatory enforcement inevitable. Indeed, that has already happened. Former Director of the Tennessee Bureau of Investigation ("TBI") John Carney and then TBI Agent David Slagel testified before the Tennessee legislature in 1992 regarding the Tennessee Gambling Act. Director Carney, who is now the District Attorney General prosecuting Rhonda Burkhart, stated that video poker/slot machines are not gambling devices *per se* under the Act: "Right now they're all legal unless they're played on, gambled on and paid off on." Similarly, TBI Agent Slagel stated that "they are an amusement device until someone puts money in them, gambles on them, [and] plays the machines."

It is undisputed that the machines seized from the Pit Row Bar were never observed to have been played on and were never observed to have been gambled on, and no person was observed being paid money for games that they won or credits that they won. It also is undisputed that the objective features of the machines in question do not allow them to pay money to the person who is playing the machine, unlike slot machines used for gambling in Las Vegas, Nevada. Without the capability to pay

out prize money, they are principally designed for amusement.

Nevertheless, District Attorney Carney, who testified before the Tennessee legislature that video poker/slot machines are not *per se* gambling devices, instituted prosecution against petitioner under the theory that the machines she owns are in fact *per se* gambling devices.

In addition, the Act is so vague that it allows the State of Tennessee to take conflicting positions before different courts to suit its objectives. The State took the position before the Court of Criminal Appeals that cards and dice are not gambling devices unless they are used to gamble or there is an attempt to use them to gamble. In contrast, Ross Haynes, an expert the State relied on in the trial court, testified that cards and dice are "inherently gambling devices." Agent Macias, one of the officers who seized petitioner's machines, also testified in the trial court that he could arrest any Krogers Department Store employee merely because the store stocked playing cards and dice.

> Q: So the dice, the cards, the poker chips, the magazine with the line, the newspapers that publish information about gambling, all of those are gambling devices?
>
> A: They could be gambling devices in the right setting, yes.
>
> Q: And, again, looking at the statute, any person who owns, manufactures, possesses, buys, sells, rents, leases, stores, repairs, transports, prints, or makes any gambling

device or record is guilty of possession of a gambling device?

A: Correct.

Q: Based on this circumstance – following along – wouldn't you agree with me that the only thing that keeps you from arresting the people who deliver the *Tennessean* to my door, or deliver the *Leaf-Chronicle* to my door, or stock the Kroger with cards or chips or dice, the only thing that keeps them from being arrested rather than [the defendant] is your decision not to arrest them?

A: Yes, sir.

Cards and dice cannot be used to gamble as they sit on a store shelf; nevertheless, the Tennessee Gambling Act gives Officer Macias the discretion to arrest a Kroger store employee or a newspaper delivery person.

II. THE DECISION IS IN CONFLICT WITH *CITY OF CHICAGO v. MORALES*, *VILLAGE OF HOFFMAN ESTATES v. FLIPSIDE*, AND OTHER DECISIONS OF THIS COURT.

A. The Decision Conflicts With the Principles Stated in *City of Chicago v. Morales*.

In *City of Chicago v. Morales*, 527 U.S. 41 (1999), this Court struck down a Chicago gang-loitering ordinance that was targeted at curbing gang activity, but was worded to allow the police to arrest anyone who "remain[ed] in any one place with no apparent purpose."

Id. at 59. The Court held that the ordinance was unconstitutionally vague because it gave the police on the beat too much discretion as to what "apparent purposes" were not loitering. *Id.* at 62. The Court illustrated this point by noting that the police at their discretion could order someone to disperse even if she were just waiting outside of Wrigley Field to catch a glimpse of Sammy Sosa, engaging in idle conversation, or enjoying a cool breeze on a warm evening. *Id.*

The Court thus invalidated Chicago's ordinance on due process grounds because the statute did not provide fair warning as to what conduct was *not* covered by the statute's vague language. The *Morales* plurality stated:

> Since the city cannot conceivably have meant to criminalize each instance a citizen stands in public with a gang member, the vagueness that dooms this ordinance is not the product of uncertainty about the normal meaning of "loitering," but rather about what loitering is covered by the ordinance and what is not.

527 U.S. at 57.

The statutes at issue here are no different. The Tennessee legislature cannot conceivably have meant to criminalize every instance where a person uses an object or device to risk something of value for a possible profit that might be contingent on chance. The Act fails to give ordinary citizens adequate notice of what is not covered by the statute's vague language. Due process does not permit a legislature to "set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." *Morales*, 527 U.S. at 60 (plurality

op.) (quoting *United States v. Reese*, 92 U.S. 214, 221 (1876)).

Rather than recognize the clear dictate of *Morales* and the long-standing precedent of this Court that " '[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes,' " 527 U.S. at 57 (plurality op.) (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)), the Supreme Court of Tennessee instead held that an individual "cannot complain of inadequate notice" if he or she is aware of a possible application of a criminal statute and " 'goes perilously close to an area of proscribed conduct.' " App. 6 (quoting *Boyce Motor Lines v. United States*, 342 U.S. 337, 340 (1952)). The court cryptically explained that "an uncertain meaning should lead to citizens 'steer[ing] far wider of the unlawful zone' than if the statute were more precise." App. 6 (alteration in original) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972)). This ruling turns the Due Process Clause on its head.

The Supreme Court of Tennessee's reliance on *Boyce Motor Lines v. United States*, 342 U.S. 337 (1952), is misplaced. In *Boyce*, the Court upheld a regulation that prohibited the knowing transport of hazardous materials "through congested thoroughfares" and other places where crowds are assembled, noting that "few words possess the precision of mathematical symbols," and thus "most statutes must deal with untold and unforeseen variations in factual situations." 342 U.S. at 341. The *Boyce* Court did not hold, however, that a criminal defendant bears the risk of incarceration for engaging in conduct that falls "perilously close" to conduct proscribed by statute. Instead, the *Boyce* Court made clear that "[a]

criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application and the lawyer in defending one charged with its violation." *Id.*

Similarly, the Supreme Court of Tennessee misconstrued this Court's decision in *Grayned v. City of Rockford*, 408 U.S. 104 (1972). *Grayned* – which involved an overbreadth and void for vagueness challenge to an anti-noise ordinance – did not hold, as the Tennessee court suggested, that individuals must be held responsible when they fail to avoid the "unlawful zone" of a statutory prohibition of uncertain scope. Instead, *Grayned* simply reaffirmed a long-standing principle of due process: "[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." 408 U.S. at 108. The Court stressed that vague statutes unconstitutionally lead to an undue restriction on liberty precisely because "[u]ncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Id.* at 409 (internal quotations omitted).

The Supreme Court of Tennessee also failed to recognize that vagueness may also invalidate a criminal law if it authorizes or "encourage[s] arbitrary and discriminatory enforcement." *Morales*, 527 U.S. at 52 (citing *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). The danger associated with criminal statutes that provide inadequate guidance to law enforcement is clear: "Where the legislature fails to

provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.' " *Kolender*, 461 U.S. at 358 (alteration in original) (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974)).

The Tennessee Gambling Act contains no guidelines for determining whether an item is – and more importantly, is not – a gambling device. The statute vests complete discretion in the hands of law enforcement to determine whether a device is prohibited. Law enforcement personnel must make this assessment based on a statutory standard that is vague and ambiguous: they must determine whether a device has objective features that permit a person to risk something of value for a profit that is to any degree contingent on chance.

The Supreme Court of Tennessee's refusal to examine whether the Act is facially invalid is contrary to another important principle recognized in *Morales*. In *Morales*, the plurality also found the Chicago ordinance unconstitutionally vague on its face, concluding:

> [I]t is clear that the vagueness of this enactment makes a facial challenge appropriate. This is not an ordinance that "simply regulates business behavior and contains a scienter requirement." *See Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). It is a criminal law that contains no *mens rea* requirement, *see Colautti v. Franklin*, 439 U.S. 379, 395 (1979), and

> infringes on constitutionally protected rights, *see id.*, at 391.

527 U.S. at 55.

As in *Morales*, vagueness so permeates the Tennessee Gambling Act that a facial challenge must invalidate the statute. The Act is not an ordinance that "simply regulates business behavior and contains a scienter requirement." *Id.* It is a criminal law that does not require that a putative defendant know that an item in his possession is a prohibited gambling device.

The treatment of simple items under the Act illustrates how vagueness permeates the statute. Under the Act's broad definitions, decks of cards and dice are prohibited gambling devices. The Court of Criminal Appeals stated, however, that a deck of cards and dice are not gambling devices, reasoning that cards and dice may be used to play numerous games with no connection to gambling. App. 36. The Court of Criminal Appeals did not specify which objective features it relied on in coming to its conclusion and the Tennessee Gambling Act – similar to many other state gambling statutes – does not exclude a device from sanction merely because it can be used for non-gambling purposes.

The objective features of these items classify them as gambling devices under the Tennessee Gambling Act because the features of dice – uniform six-sided cubes with sides numbered from one to six – are suited for gambling; there is no way to predict what sides will face up when the dice are rolled (*i.e.*, the result is entirely dependent on chance). The objective features of a deck of identically shaped cards suits them for gambling also,

because once shuffled there is no way to predict what card will be drawn from the deck.[2] Indeed, the state of Ohio specifically defines dice and a deck of cards as gambling devices. Ohio Rev. Code Ann. § 2915.01(F)(3).

Moreover, the Tennessee Gambling Act does not require that a device actually be used for gambling, or even possessed with such intent. Nor does the Act require that persons know that an object in their possession is a "gambling device." Consequently, under the Act, the dice in a Monopoly set are indistinguishable from the dice on a craps table; both are prohibited gambling devices.

As in *Morales*, the vagueness that dooms the Tennessee Gambling Act is not merely the product of uncertainty about what is prohibited by the Act, but what items are not prohibited. 527 U.S. at 57. "When vagueness permeates the text of such a law, it is subject to facial attack." *Id.* at 55.

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[2] Historical evidence also indicates that cards and dice were designed for gambling and their objective features make them suited for gambling. Dice and cards have been used to gamble for centuries. *See, e.g., The Living Bible*, Luke 23:34 ("And the soldiers gambled for his clothing, throwing dice for each piece."). In Colonial times, cards and dice were outlawed in the Massachusetts Bay Colony. *See* i. Nelson Rose, *Gambling and the Law – Update 1993*, 15 Hastings Comm. & Ent. L.J. 93, 95 (1992) (citing John Noble, 2 Records of the Court of Assistants of the Colony of Massachusetts Bay 12 (1631) (1904 ed.)).

B. The Decision Ignores this Court's Teachings in *Village of Hoffman Estates v. Flipside.*

The Tennessee courts adopted a narrowing construction of the gambling device provisions by relying on the "principle use" standard espoused in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982). In *Hoffman Estates*, this Court held that the phrase "designed for use with illegal drugs" meant that an item must be designed to be "principally used with illegal drugs by virtue of its objective features, *i.e.*, features designed by the manufacturer." 455 U.S. at 501 (quotation omitted).

The Court of Criminal Appeals held that the phrase "designed for use in gambling" in section 501(3) means designed principally for use in gambling, such design to be gauged by the objective features incorporated into the device by its manufacturer. App. 31. Notwithstanding the fact that the "designed principally for use" standard does not save the Act from invalidation on vagueness grounds, this reading of *Hoffman Estates* misunderstands its import. This Court did not state that the principal design standard *by itself* is enough to overcome a vagueness challenge.

In *Hoffman Estates*, the ordinance was clarified by guidelines prepared and issued by the City Attorney, who specifically identified items that are "designed or marketed for use with" illegal drugs, including rolling paper, roach clips, and pipes. *Id.* at 492-93 n.3. This Court repeatedly referenced the city's guidelines and found it important that some of the items the defendant was alleged to

have offered for sale were actually identified in the city's guidelines.

Moreover, the Court found it unnecessary to evaluate whether the ordinance was vague as to items not listed in the city's guidelines because it concluded that the defendant sold items that were specifically identified in the guidelines: "[T]he 'designed for use' standard is sufficiently clear to cover at least some of the items that Flipside sold. The ordinance, *through the guidelines*, explicitly regulates 'roach clips.' Flipside's co-operator admitted that the store sold such items. . . . " 455 U.S. at 502 (emphasis added).

Although the guidelines at issue in *Hoffman Estates* did not itemize all of the prohibited paraphernalia, what was listed provided guidance as to the specific design features that the city considered relevant in evaluating whether an item is principally designed for use with illegal drugs. 455 U.S. at 492-93 n.3. The guidelines' specification of representative examples of drug paraphernalia was central to the Court's decision. *See, e.g., United States v. Dyer*, 750 F. Supp. 1278, 1296 (E.D. Va. 1990) ("In *Hoffman Estates*, the Supreme Court found that the phrase 'designed for use' was not ambiguous when accompanied by guidelines that referred to specific items as drug paraphernalia."); *Philman's, Inc. v. City of West Carrollton*, 577 F. Supp. 1380, 1388 (S.D. Ohio 1983) ("The Supreme Court in *Hoffman Estates* relied extensively on the guidelines in its void-for-vagueness discussion.").

Here, as distinguished from *Hoffman Estates*, there are no guidelines; the State of Tennessee has provided neither statutory guidance nor supplemental guidelines to

assist in evaluating whether an item exhibits the objective features of a gambling device. There is no catalogue of design features, no description of representative devices, and no list of prohibited gambling devices from which individuals and law enforcement can glean the features that make a device "designed for use in gambling." The absence of such guidance is striking. The Court stated in *Hoffman Estates*, albeit in *dicta*, that without the guidelines the ordinance at issue may not have passed constitutional muster: "We agree with the Court of Appeals that a regulation of 'paraphernalia' alone would not provide much warning of the nature of the items regulated." 455 U.S. 500 n.17 (citing *Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates*, 639 F.2d 373, 380 (7th Cir. 1981), *rev'd*, 455 U.S. 489 (1982)).[3]

This Court also warned of a heightened risk of discriminatory enforcement when law enforcement officials offer conflicting interpretations of a statute, noting the confusing public statements of key city officials: "Testimony of the Village Attorney who drafted the ordinance, the Village President, and the Police Chief revealed confusion over whether the ordinance applies to certain items. . . . " *Hoffman Estates*, 455 U.S. at 503. Although the Court was not prepared to invalidate the ordinance on

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[3] The Court cited to page 380 of the Court of Appeal's opinion, wherein the Seventh Circuit stated:

> Unless the license guidelines give additional clarity to this phrase, we must agree with plaintiff that the ordinance is so vague that it does not give sufficient notice to merchants as to whether they are required to obtain a license. . . .

Flipside, 639 F.2d at 380.

the basis of these statements, it cautioned that in light of these statements "[w]e do not suggest that the risk of discriminatory enforcement is insignificant here." *Id.* Here, as in *Hoffman Estates*, law enforcement officers have provided inconsistent – and conflicting – public statements concerning the reach of the Tennessee Gambling Act.

III. TENNESSEE'S GAMBLING STATUTE IS UNCONSTITUTIONALLY OVERBROAD BECAUSE IT IMPINGES ON FIRST AMENDMENT RIGHTS

The Supreme Court of Tennessee refused to consider whether the Tennessee Gambling Act impacts any First Amendment rights. The Act, however, plainly brings newspapers within its ambit. Section 505 provides, in part:

> A person commits an offense who knowingly owns, manufactures, possesses, buys, sells, rents, leases, stores, repairs, transports, *prints* or makes any gambling device or *record*.

Tenn. Code Ann. § 39-17-505(a) (emphasis added).

Newspapers may not exhibit the objective features typically found in gambling devices, yet they fall within the statute's definition. Although a newspaper is not designed for use in gambling, this addresses only one of three independent bases for possible criminal prosecution under the Act. A newspaper can be considered a gambling device if it is used in gambling or if it is intended for use in gambling. A significant amount of information in a newspaper can be used in such a way that the

activity falls within the statute's broad definition of "gambling": information on sporting events, betting lines, and even stock information (where chance seems to be playing a growing role in the likelihood of profit).

The Tennessee Gambling Act also implicates a substantial amount of constitutionally protected speech. Officer Macias testified before the trial court that he could arrest a person for delivering a newspaper that included gambling lines or lottery numbers:

> Q: Likewise, if the *Leaf-Chronicle* publishes the winning numbers from the Kentucky lottery, that's a gambling record; correct?
>
> A: Yes, sir, it is.
>
> Q: And likewise if the *Tennessean* advertises the Casino Grand, Tunica Casino, that constitutes a gambling device; is that correct?
>
> A: (no response.)
>
> Q: Gambling record?
>
> A: Gambling record, I would agree with, yes.

Leaving no doubt as to the chilling effect on the Tennessee newspaper industry, Officer Macias further testified that at his discretion he could arrest the person who delivers the *Tennessean*.

The possibility that the Tennessee Gambling Act restricts freedom of speech demands a heightened level of scrutiny. In the context of First Amendment rights, this Court has imposed a higher standard, which requires that statutes that impinge on freedom of expression must have a greater degree of specificity than in other contexts so as

to insure that citizens will not be "chilled" from exercising their constitutional rights. *See, e.g., Smith v. Goguen*, 415 U.S. 566, 573 (1974).

It does not avail the Supreme Court of Tennessee to state that a newspaper publisher has not yet been prosecuted under the Act. It is an axiom of First Amendment jurisprudence that the chilling of expressive conduct is enough to warrant invalidation. *See, e.g., Forsyth County v. Nationalist Movement*, 505 U.S. 123, 129 (1992). As this Court noted in *Grayned*: "[W]here a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." 408 U.S. at 108-109 (footnotes omitted) (alterations and second omission in original).

IV. THIS IS A CASE OF UNUSUAL PUBLIC IMPORTANCE

The manufacture, storage, and possession of gambling devices are governed by two bodies of law: the state law of the jurisdiction in which the machines are manufactured or kept and the federal Johnson Act of 1951 as amended by the Gambling Devices Act of 1962, 15 U.S.C. §§ 1171-1178 ("Gambling Devices Act"). State law generally determines whether it is legal to manufacture or possess certain types of devices used in gaming. Federal law imposes registration, labeling, and record keeping requirements on entities that manufacture, distribute, or repair statutorily defined gambling devices in states

where their manufacture or possession is permitted. Federal law also prohibits the interstate transport of a "gambling device" into any state that has made the device illegal.

This case is important because at least thirteen states define "gambling devices" in a way that is essentially the same as that found in the Tennessee Gambling Act.[4] These states generally define a gambling device as "any device, machine, paraphernalia, or equipment that is used or usable in the playing phases of unlawful gambling." Alaska Stat. § 11.66.280(3). Other states have made slight variations to the "used or usable" standard, narrowing the definition, but not correcting the problem of overinclusiveness. Arkansas, for example, prohibits any device "adapted, devised, or designed for the purpose of playing any game of chance, or at which any money or property may be won or lost." Ark. Stat. Ann. § 5-66-104; *see also* Iowa Code § 725.9(3).

All thirteen of the states that define a "gambling device" in a way that is similar to that found in the Tennessee statute, also define "gambling" in terms that make their state gambling statutes facially as broad as the

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[4] *See* Alaska Stat. § 11.66.280(3); Ala. Code § 13A-12-20(5); Colo. Rev. Stat. § 18-10-102(3); Haw. Rev. Stat. § 712-1220(5); Me. Rev. Stat. Ann. tit. 17-A § 952(5); Mo. Ann. Stat. § 572.010(5); Neb. Rev. Stat. § 28-1101(5); N.J. Rev. Stat. § 2C:37-1(e); N.Y. Penal Law § 225.00(7); N.D. Cent. Code § 12.1-28-01(3); Or. Rev. Stat. § 167.117(5); Utah Stat. § 76-10-1101(3); Wyo. Stat. § 6-7-101(a)(iv).

Tennessee Gambling Act.[5] These states typically define "gambling" as risking "something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome." N.Y. Penal Law § 225.00(2).

On the other hand, some states have adopted much more precise definitions of "gambling." For example, Florida defines "gambling" as engaging "in any game at cards, keno, roulette, faro or other game of chance, at any place, by any device whatever, for money or other thing of value." Fl. Stat. § 849.08. This narrower definition of "gambling" stands in contrast to the broad definition found in the Tennessee Gambling Act.

Because the Tennessee Gambling Act and the gambling statutes of many other states suffer from impermissibly vague definitions of "gambling" and "gambling device," the statutes cast a net so wide that they criminalize a significant amount of otherwise lawful activity. State legislatures are not powerless, however, to draft statutes that proscribe the use of certain devices for gambling and still comport with due process. Several states have statutes that expressly define which video gaming devices

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[5] *See* Alaska Stat. § 11.66.280(2); Ala. Code § 13A-12-20(4); Colo. Rev. Stat. § 18-10-102(2); Haw. Rev. Stat. § 712-1220(4); Me. Rev. Stat. Ann. tit. 17-A § 952(4); Mo. Ann. Stat. § 572.010(4); Neb. Rev. Stat. § 28-1101(4); N.J. Rev. Stat. § 2C:37-1(b); N.Y. Penal Law § 225.00(2); N.D. Cent. Code § 12.1-28-01(1); Or. Rev. Stat. § 167.117(7); Utah Stat. § 76-10-1101(1); Wyo. Stat. § 6-7-101(a)(iii).

are prohibited.[6] Other states exclude from the definition of "gambling device" certain games that do not pay out money, but merely provide free replays. *See* Miss. Code Ann. § 97-33-7; S.D. Codified Laws Ann. § 22-25-13; W. Va. Code § 61-10-1.

An additional problem associated with the Tennessee Gambling Act and other state gambling statutes is that prosecution can proceed without proof that the devices have been used for gambling purposes. Where, as here, a state has adopted a definition of "gambling device" that

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[6] *See* N.J. Rev. Stat. § 2C:37-1(f); Or. Rev. Stat. § 167.117(9); Utah Stat. § 76-10-1101(6). For example, Utah requires that a prohibited video gaming device possess all of the following characteristics:

> (a) a video display and computer mechanism for playing a game;
>
> (b) the length of play of any single game is not substantially affected by the skill, knowledge, or dexterity of the player;
>
> (c) a meter, tracking, or recording mechanism that records or tracks any money, tokens, games, or credits accumulated or remaining;
>
> (d) a play option that permits a player to spend or risk varying amounts of money, tokens, or credits during a single game, in which the spending or risking of a greater amount of money, tokens, or credits: (i) does not significantly extend the length of play time of any single game; and (ii) provides for a chance of greater return of credits, games, or money; and
>
> (e) an operating mechanism that requires inserting money, tokens, or other valuable consideration in order to function.

Utah Stat. § 76-10-1101(6).

sweeps within its purview a significant amount of otherwise legal activity, it is critical that the state demonstrate that the device has been used for gambling. *Cf. Monte Carlo Parties, Ltd. v. Webb*, 322 S.E.2d 246, 249 (Ga. 1984) (roulette wheels, poker tables, and various other gambling items held not subject to confiscation because there was no evidence that they had been used for gambling).

This is a case of unusual public importance because it concerns the limits of legislative authority and highlights the obligation of a legislature to enunciate clear legal rules, to draft statutes consistent with constitutional constraints, and to properly guide – and limit – the discretion of law enforcement personnel. The Tennessee Gambling Act and the gambling statutes of other states ignore fundamental principles of due process and permit criminal liability to turn on the unfettered discretion of law enforcement personnel.

CONCLUSION

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

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DATE: January 8, 2002

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE
February 7, 2001 Session

STATE OF TENNESSEE v. RHONDA BURKHART

Appeal by Permission from the
Court of Criminal Appeals
Circuit Court for Montgomery County
No. 38568 John H. Gasaway, III, Judge

No. M1998-00344-SC-R11-CD

(Filed Oct. 10, 2001)

We granted this appeal to determine the constitutionality of Tenn. Code Ann. §§ 39-17-501 and 39-17-505. We hold that Tenn. Code Ann. §§ 39-17-501 and 39-17-505 are neither unconstitutionally vague as applied to this case nor overbroad and therefore do not violate the guarantees of due process provided by the Constitution of the United States and the Constitution of Tennessee. The judgment of the Court of Criminal Appeals is affirmed.

Tenn. R. App. P. 11 Appeal by Permission;
Judgment of the Court of Criminal Appeals Affirmed.

JANICE M. HOLDER, J., delivered the opinion of the court, in which FRANK F. DROWOTA, III, C.J., and E. RILEY ANDERSON, ADOLPHO A. BIRCH, JR., and WILLIAM M. BARKER, JJ, joined.

David S. Ardia, Washington, D.C., and Robert Michael Friedman, Memphis, Tennessee, for the appellant, Rhonda Burkhart.

Paul G. Summers, Attorney General and Reporter; Michael E. Moore, Solicitor General; and Daryl J. Brand, Associate Solicitor General, for the appellee, State of Tennessee.

OPINION

I. FACTS AND PROCEDURAL HISTORY

On January 10, 1997, Officer Raymond Macias (Officer Macias) conducted an alcohol control inspection at the Pit Row Bar in Clarksville, Tennessee. The bar was owned by Rhonda Burkhart (Burkhart). While performing the inspection of the bar, Officer Macias discovered six video slot machines known as One-Armed Bandits, Cherrymasters, or Fevers. The machines were in a locked room near the rear of the bar. The machines were plugged in but were not being operated.

Each of the machines accepted paper currency and coins. To operate a machine, a player would push a button. If the appropriate sequence of symbols appeared, the machine accumulated credits. "Knock-off" switches and retention meters inside the machines recorded the number of games or credits won by the player. The machines did not distribute monetary winnings to players. A refund switch, however, could be used to return money that had been inserted. The player maintained no control over the results of the game by using any skill. The settings within the machines, however, could be changed by the owner of the devices to adjust

the odds of winning. The machines did not display amusement stickers.[1]

Officer Macias confiscated the machines. Burkhart was then charged with possession of a gambling device in violation of Tenn. Code Ann. § 39-17-505 (1989). Burkhart filed a motion to dismiss the charge, challenging the constitutionality of Tenn. Code Ann. §§ 39-17-501 and 39-17-505. The trial court granted the motion, ruling that the statutes were so overly broad and unduly vague in proscribing "gambling devices" that application of Tenn. Code Ann. § 39-17-505 was unconstitutional. The Court of Criminal Appeals held the statutes constitutional and remanded the case to the trial court. We affirm the ruling of the intermediate court and hold that Tenn. Code Ann. §§ 39-17-501 and 39-17-505 are neither unconstitutionally vague as applied to this case nor overbroad.

II. VAGUENESS CHALLENGE TO A CRIMINAL STATUTE

Burkhart challenges Tenn. Code Ann. §§ 39-17-505 and 39-17-501 as unconstitutionally vague. Section 39-17-505 reads in pertinent part:

> [A] person commits an offense who knowingly owns, manufactures, possesses, buys, sells, rents, leases, stores, repairs, transports, prints or

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[1] Section 67-4-507(b)(I)(A) of the Tennessee Code Annotated requires that the owner of coin-operated amusement devices pay a tax for each such device maintained. Upon payment of the tax, the owner/operator is issued a tax stamp, which must be placed on the amusement device. Tenn. Code Ann. § 67-4-507(c) (1989).

> makes any gambling device or record. However, it is not an offense for a person to own or possess in this state a lottery ticket originating from a state in which a lottery is lawful, if such ticket is not owned or possessed for the purpose of resale.

(1989) (amended effective July 1, 2001). Section 39-17-501 provides the following definitions for application in § 39-17-505:

> (1) "Gambling" means risking anything of value for a profit whose return is to any degree contingent on chance, but does not include a lawful business transaction; . . .
>
> . . . .
>
> (3) "Gambling device or record" means anything designed for use in gambling, intended for use in gambling, or used for gambling;
>
> (4) "Lawful business transaction," as used in subdivision (1) includes any futures or commodities trading. . . .

(1989). Burkhart contends (1) that the definitions of "gambling device" and "gambling" are unconstitutionally vague as applied to her because they fail to provide sufficient notice that video slot machines are gambling devices; and (2) that the statutes are facially vague.

III. VAGUENESS OF SECTIONS 39-17-501 & 39-17-505 OF THE TENNESSEE CODE ANNOTATED AS APPLIED TO BURKHART

A statute may be void for vagueness if it is not "sufficiently precise to put an individual on notice of

prohibited activities." *State v. Wilkins,* 655 S.W.2d 914, 915 (Tenn. 1983). A criminal statute must be construed according to the fair import of its terms when determining if it is vague. *See* Tenn. Code Ann. § 39-11-104 (1989). Due process requires that a statute provide "fair warning" and prohibits holding an individual criminally liable for conduct that a person of common intelligence would not have reasonably understood to be proscribed. *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972); *see also State v. Lyons,* 802 S.W.2d 590, 591 (Tenn. 1990). The fair warning requirement, however, does not demand absolute precision in the drafting of criminal statutes. *See Wilkins,* 655 S.W.2d at 916. A statute is not vague "which by orderly processes of litigation can be rendered sufficiently definite and certain for purposes of judicial decision." *Id.* (quoting *Donathan v. McMinn County,* 213 S.W.2d 173, 176 (Tenn. 1948)). Courts should consider any limiting instructions of the challenged statute that state authorities have proffered. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 495, n.5 (1982) (citing *Grayned,* 408 U.S. at 110)). In fact, it is the duty of the courts "to adopt a construction which will sustain a statute and avoid constitutional conflict if its recitation permits such a construction." *Lyons,* 802 S.W.2d at 592.

Applying these standards to the statutes in question, we hold that §§ 39-17-501 and 39-17-505 are not unconstitutionally vague as applied to Burkhart because she engaged in conduct that is clearly proscribed by the statutes. A gambling device is defined as "anything designed for use in gambling, intended for use in gambling, or used for gambling." Tenn. Code Ann.

§ 39-17-501. This definition is sufficiently clear to provide notice that a slot machine is a gambling device.

A slot machine is designed for use in gambling and normally intended for use in gambling. The outcome of a game on Burkhart's machines is contingent upon chance. Skill is not required to play the slot machines. The confiscated machines were equipped with knock-off switches and retention meters. The number of games or credits won by the player could be recorded by the machines. The knock-off switch on the machines allowed credits won to be removed from the screen but remain recorded within the machine. Unlike standard arcade games, the settings on the slot machines could be changed to manipulate the odds of winning. The characteristics of the machines demonstrate their design for use in gambling.

Even if uncertainty existed as to whether slot machines are gambling devices under Tenn. Code Ann. § 39-17-501, it is not "unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." *Boyce Motor Lines v. United States,* 342 U.S. 337, 340 (1952). A person who is aware of a possible application of the statute and nevertheless proceeds cannot complain of inadequate notice when arrested. Indeed, an uncertain meaning should lead to citizens "steer[ing] far wider of the unlawful zone" than if the statute were more precise in the use of its language. *Grayned v. City of Rockford,* 408 U.S. 104, 109 (1972).

The legislative intent that the definition of "gambling devices" in Tenn. Code Ann. § 39-17-501 include slot machines is evidenced by the Sentencing Commission

Comments to the statute. The legislature approved the publication of the Sentencing Commission Comments. *See* Tenn. Pub. Acts, ch. 591, § 114. The Comments are therefore evidence of legislative intent. *See State v. Horton*, 880 S.W.2d 732, 735 (Tenn. Crim. App. 1994). The comments state that "[t]his section contains the definitions for gambling offenses. *The definitions are intentionally broader than those found in prior law.*" (emphasis added). The pre-1989 statute definition of a "gambling device" states in pertinent part that

> [t]his definition shall not include any coin-operated game or device designed and manufactured for bona fide amusement purposes only, which may, by application of skill, entitle the player to replay the game at no additional cost if:
>
> (A) The game or device accumulates and reacts to no more than fifteen (15) free replays;
>
> (B) Discharges accumulated free replays only by reactivating the game or device for one (1) additional play for each accumulated free replay; and
>
> (C) Makes no permanent record, directly or indirectly, of free replays.

Tenn. Code Ann. § 39-6-601(4) (1982 repl.).

The language of the pre-1989 statute establishes that the legislature clearly intended that the definition of gambling device include slot machines like those owned by Burkhart. Reading the Sentencing Commission Comments to Tenn. Code Ann. § 39-17-501 in conjunction with the pre-1989 statute shows that these machines continue to be gambling devices under the current statutes.

Because the legislature intended the statutes to be broader than the prior statute, the new definition of gambling devices includes items deemed gambling devices in the previous statute and any other gambling devices that the previous statute may not have included. Burkhart, therefore, was clearly on notice that her slot machines were prohibited by the broader definition of a gambling device found in Tenn. Code Ann. § 39-17-501.

IV. FACIAL VAGUENESS OF SECTIONS 39-17-505 & 39-17-501 OF THE TENNESSEE CODE ANNOTATED

Due process also provides that a criminal law may be facially vague if it authorizes and encourages arbitrary and discriminatory enforcement. *See City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (plurality opinion). A statute that provides "no legally fixed standards and leaves to 'personal predilections' of an officer, prosecutor, judge or jury the determination of the illegality of conduct" may be held vague on its face. *Lyons*, 802 S.W.2d at 591 (citing *Smith v. Goguen*, 415 U.S. 566 (1974)). While law enforcement requires some degree of police judgment, a statute that "entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat" is unconstitutionally vague. *Goguen*, 415 U.S. at 575. Therefore, in the absence of guidelines a law is impermissibly vague only if it "delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 531 (Tenn. 1993) (citing *Grayned*, 408 U.S. at 114).

Facial vagueness challenges, however, that implicate no constitutionally protected conduct should be sustained only if the statute is impermissibly vague in all its applications. *See Hoffman Estates,* 455 U.S. at 494-95. A party who engages in conduct that is clearly proscribed by the statute cannot complain of the vagueness of the law as applied to others. *See id.* at 495; *see also Parker v. Levy,* 417 U.S. 733, 756 (1974) (holding that "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness."). Courts should therefore examine the conduct of the moving party before analyzing hypothetical applications of the law. *See id.* In the absence of a facial infirmity, the Court will not consider "in advance of application all possible contingencies of attempted prosecution under a criminal statute, and declare which are constitutional and which are not." *State v. King,* 635 S.W.2d 113, 114 (Tenn. 1982). The rationale for this requirement is that "to sustain such a challenge, the complainant must prove that the enactment is vague 'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.' " *Hoffman Estates,* 455 U.S. at 495, n.7. (quoting *Coates v. City of Cincinnati,* 402 U.S. 611, 614 (1971)).

Because the statutes are not vague as applied to Burkhart's possession of slot machines, we further hold that she may not successfully challenge the statutes as facially vague. She alleges that her conduct is not clearly proscribed by the statutes because of contradictory interpretations of the statutes by law enforcement officials. In

Hoffman Estates, the United States Supreme Court considered whether a drug paraphernalia ordinance was vague in light of testimony from various officials indicating confusion over the ordinance's application. 455 U.S. at 503. The Court noted that the judgment of police officers was heavily relied upon to interpret and enforce the ordinance. *Id.* The Court, however, refused to rely upon these contradictory interpretations to find the ordinance vague, despite the Court's acknowledgment that the risk of discriminatory enforcement was not insignificant. *Id.* Critical to the Court's reasoning was the fact that no evidence was introduced establishing that the ordinance had actually been enforced in a discriminatory manner. *Id.* The Court therefore concluded that the ordinance was "sufficiently clear that the speculative danger of arbitrary enforcement [did] not render the ordinance void for vagueness." *Id.*

In this case, like *Hoffman Estates,* no evidence in the record suggests that the statutes have actually been enforced in an arbitrary or discriminatory manner. Burkhart offers several hypothetical situations to which the statute could be applied. However, "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute." *Hill v. Colorado,* 530 U.S. 703, 732 (2000). The statutes are sufficiently clear and objective as applied to the present situation. Burkhart's speculations, therefore, do not support a facial attack on the statutes.

We will not consider in advance all possible contingencies of attempted prosecution under the statutes and determine which are constitutional. The statutes as

applied to the machines that Burkhart possessed are constitutional. Therefore, Burkhart's facial vagueness challenge does not succeed. Accordingly, the vagueness challenges to Tenn. Code Ann. §§ 39-17-501 and 39-17-505 fail.

V. OVERBREADTH CHALLENGE TO A CRIMINAL STATUTE

A statute may be challenged as overbroad when it reaches a substantial amount of constitutionally protected conduct. *Hoffman Estates, Inc.*, 455 U.S. at 494. A statute may be invalid on its face if it inhibits the exercise of First Amendment rights and "if the impermissible applications of the law are substantial when 'judged in relation to the statute's plainly legitimate sweep.' " *Morales*, 527 U.S. at 55 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612-15 (1973)). To maintain an overbreadth challenge, Burkhart must first show that the statute challenged involves constitutionally protected conduct. *See Hoffman Estates*, 455 U.S. at 494. If the statute reaches a substantial amount of constitutionally protected conduct, a defendant must then "demonstrate from the text of the law and actual fact that there are a substantial number of instances where the law cannot be applied constitutionally." *Lyons*, 802 S.W.2d at 593.

Gambling or possessing a gambling device is not constitutionally protected conduct. The statutes, therefore, do not reach a substantial amount of constitutionally protected conduct. Burkhart alleges, however, that Tenn. Code Ann. §§ 39-17-501 and 39-17-505 violate freedom of speech under the First Amendment of the United States

Constitution and Article I, § 19 of the Tennessee Constitution.

She asserts that the statutes prohibit the right to publish newsworthy information such as lottery numbers from adjacent states. Based upon the record, no evidence reveals that newspaper publishers or owners have been prohibited by Tenn. Code Ann. § 39-17-505 from publishing this information. Burkhart further does not allege that arrests have been made under Tenn. Code Ann. §§ 39-17-501 and 39-17-505 for such newspaper publications. Even if we were to find that Tenn. Code Ann. §§ 39-17-501 and 39-17-505 reach a substantial amount of constitutionally protected conduct, Burkhart has failed to "demonstrate from the text of the law and actual fact that there are a substantial number of instances where the law cannot be applied constitutionally." *Lyons,* 802 S.W.2d at 593 (Tenn. 1990). The overbreadth challenge to the statutes is therefore without merit.

CONCLUSION

Slot machines are gambling devices as defined by Tenn. Code Ann. §§ 39-17-501 and 39-17-505. The machines confiscated from Burkhart's place of business were slot machines. Burkhart, therefore, engaged in conduct clearly proscribed by the statutes. The statutes are not constitutionally vague as applied to her. Because Burkhart engaged in conduct clearly proscribed by the statutes, she cannot maintain a successful facial vagueness challenge to the statutes.

Sections 39-17-501 and 39-17-505 of the Tennessee Code Annotated do not reach a substantial amount of

constitutionally protected conduct. The statutes, therefore, are not overbroad. The judgment of the Court of Criminal Appeals is affirmed. Costs of this appeal are taxed to Burkhart for which execution may issue if necessary.

/s/ Janice M. Holder
JANICE M. HOLDER,
JUSTICE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE
February 7, 2001 Session

STATE OF TENNESSEE v. RHONDA BURKHART

Circuit Court for Montgomery County
No. 38568

No. M1998-00344-SC-R11-CD

JUDGMENT

(Filed Oct. 10, 2001)

This cause came on to be heard upon the record on appeal from the Middle Section Court of Criminal Appeals, briefs and argument of counsel; and upon consideration thereof, this Court is of the opinion that Tenn. Code Ann. §§ 39-17-501 and 39-17-505 are neither unconstitutionally vague as applied to this case nor overbroad and therefore do not violate the guarantees of due process provided by the Constitution of the United States and the Constitution of Tennessee.

In accordance with the opinion filed herein, it is, therefore, ORDERED AND ADJUDGED by this Court that the judgment of the Court of Criminal Appeals holding that the statutes are constitutional be and the same is hereby affirmed.

The costs of this appeal are taxed to the Appellee, Rhonda Burkhart, for which execution may issue if necessary.

IN THE COURT OF
CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE, Appellant, v. RHONDA LEIGH BURKHART, Appellee.	No. M1998 00344 CCA R3 CD Montgomery County, No. 38568 below Possession of gambling devices REVERSED AND REMANDED

JUDGMENT

(Filed Dec. 6, 1999)

Came the defendant, Rhonda Leigh Burkhart, by counsel, and the state, by the Attorney General, and this cause was heard on the record on appeal from the Circuit Court of Montgomery County; and upon consideration thereof, this court is of the opinion that there is reversible error in the order of the trial court dismissing the indictment.

It is, therefore, ordered and adjudged that the order of the trial court dismissing the indictment is reversed and the case is remanded to the Circuit Court of Montgomery County for reinstatement of the indictment and for further proceedings consistent with this opinion.

Costs of the appeal are taxed to the defendant, Rhonda Leigh Burkhart, for which let execution issue is necessary.

Joseph M. Tipton, Judge

James Curwood Witt, Jr., Judge

John Everett Williams, Judge

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JULY 1999 SESSION

STATE OF TENNESSEE, Appellant, v. RHONDA LEIGH BURKHART, Appellee.	)	No. M1998 00344 CCA R3 CD Montgomery County Honorable John H. Gasaway, Judge (Possession of Gambling Devices)

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OPINION FILED: DEC 6 1999

REVERSED AND REMANDED

Joseph M. Tipton
Judge

OPINION

The state appeals as of right from the Montgomery County Circuit Court's dismissal of an indictment charging the defendant, Rhonda Leigh Burkhart, with knowingly possessing gambling devices, specifically, six "One-Armed Bandit" video machines, in violation of Tenn. Code Ann. § 39-17-505. The state contends that the trial court erred in finding portions of Tenn. Code Ann. §§ 39-17-501 and -505 unconstitutionally vague and overbroad. We hold that the statutes are constitutionally sound and we reverse the dismissal of the indictment.

The Clarksville Police Department seized six video machines from the defendant's bar. At the preliminary hearing, Raymond Mario Marcias, an alcohol beverage control agent with the Clarksville Police Department, testified that on January 10, 1997, he went to the Pit Row Pool Room to check for violations of alcohol control ordinances. He said that the manager, Ms. Poston, gave him permission to look around. He said that while walking through the building, he noticed a door marked "office." He said the manager permitted him to enter, and he noticed that the wall did not extend completely to the ceiling. He said he also noticed a door with a deadbolt lock. He said he asked the manager what was behind the door, and she told him video machines. He said he asked to see behind the door, and the manager retrieved a set of

keys, none of which would open the door. He stated that the manager agreed to allow Agent Crow to look over the wall. He said that Agent Crow reported that the room held six video machines and that the door could be unlocked from the inside. Agent Marcias said the manager allowed Agent Crow to climb over the wall and to unlock the door.

Agent Marcias testified that the room contained video machines and a heater. He said that each machine had a stool. He said the screens were on, and the machines automatically demonstrated a certain number of games. He said he noticed two switches on the top of each machine, one of which appeared to be a "knock-off" switch. He said he noticed that each machine had a bill acceptor, which took one-dollar bills, five-dollar bills, and twenty-dollar bills. He said that he found a total of seventy dollars in the machines. He said he advised the manager that he was confiscating the machines as gambling devices. He admitted that he did not see anyone playing the machines.

Ross Elbert Haynes testified that he worked for the Knox County District Attorney General's Office and was assigned to a federal task force which investigated gambling operations and trained local officers to recognize gambling devices. He said that he examined the six machines from the defendant's bar. He said the machines' lack of serial numbers violated federal law. He said that the machines required no skill to play and that once a player pushed the button starting the game, the player had no further control over the game. He stated that each machine had a knock-off switch, which allowed the credits to be removed ostensibly once the player was paid

for them. He said the only way to remove the score on a true amusement device is to insert another coin for a new game. He said he believed the machines were gambling devices because the game took an inordinately short time to play in relation to the amount of money required to play, because they had knock-off switches, and because each machine had a meter which retained the credits run off the machine. He noted that one could adjust the odds of winning on these machines. He admitted that the machines could not pay out money.

At the combined hearing on the defendant's motion to suppress and motion to dismiss the indictment, Agent Marcias again described his discovery of the machines. He testified that he believed the machines to be gambling devices because they had a knock-off switch and lacked an amusement sticker, but he admitted that at the time, he was thinking strictly in terms of the prior statute's definition of a gambling device. He admitted that the machines had no slot to distribute money and that he found no evidence that anyone had been gambling in the room. He said the defendant's arrest was prompted by the fact that the room was hidden, the door locked from the inside, and the machines' speakers had been disconnected to prevent them from emitting sound. Agent Marcias stated that dice, playing cards, and poker chips all could be considered gambling devices in the right setting. He said that the only thing preventing a grocery store employee who stocked these items from being arrested under the current statute was his decision not to arrest that person.

Carl McClanahan testified that he was a registered lobbyist for gambling-related issues and that he had studied Tennessee's gambling laws. He said that in his opinion, dice, poker chips, and playing cards were all gambling devices under the current law, even without someone using them to gamble, because they were designed for use in gambling. He testified that objectively no difference exists between these items and the video machines at issue in this case. He stated that the current definition of a gambling device provides no standard for law enforcement.

Mr. McClanahan admitted that one can play cards or use dice without gambling. He said he was familiar with the video machines owned by the defendant. He said video poker is a generic term for games with a gambling theme and that the defendant's machines have a slot-machine theme. He said he believed these machines were designed for recreation and entertainment. He said the knock-off switches simply allow the machine's owner to prevent a subsequent user from taking advantage of unused free plays.

The trial court dismissed the indictment with prejudice, concluding:

> having carefully considered . . . § 39-17-505, and . . . having determined that application of the definitions [in] § 39-17-501 regarding "gambling devices" and "gambling" and the resulting application of . . . § 39-17-505 is so overly broad and unduly vague in proscribing "gambling devices" that application of the criminal statute . . . § 39-17-505 constitutes a denial of equal

> protection under the law and due process guaranteed citizens under the Constitution of the United States and the Constitution of the State of Tennessee such that prosecution . . . under this statute is constitutionally prohibited.

I. DUE PROCESS

The state contends that Tenn. Code Ann. §§ 39-17-501 and -505 comport with due process, arguing that the statutes are not overbroad because they implicate no constitutionally protected rights. It asserts that the statutes are not vague because the Sentencing Commission Comments, the case law under the prior statute and the opinions of the attorney general serve to guide citizens and law enforcement as to the meaning of the statutes. The defendant contends that §§ 39-17-501 and -505 are unconstitutionally vague because they fail to provide fair notice and allow arbitrary and discriminatory enforcement.

Under the due process clause, a party may facially attack the constitutionality of a statute under two doctrines: overbreadth and vagueness. The overbreadth doctrine provides that a statute is invalid on its face if it reaches a substantial amount of constitutionally protected conduct. *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 495, 102 S. Ct. 1186, 1191 (1982). Constitutionally protected conduct is generally viewed as the exercise of First Amendment rights. *City of Clarksville v. Moore*, 688 S.W.2d 428, 430 (Tenn. 1985); *see City of Chicago v. Morales*, ___ U.S. ___, ___, 119 S. Ct. 1849, 1857 (1999); *Hoffman Estates*, 455 U.S. at 496, 102 S. Ct. at 1192; *Broadrick v. Oklahoma*, 413 U.S. 601, 611-12, 93 S. Ct. 2908, 2915-16 (1973); *see also*

United States v. Salerno, 481 U.S. 739, 746, 107 S. Ct. 2095, 2100 (1987) (stating that the overbreadth doctrine *only* applies in the context of the First Amendment); *Schall v. Martin*, 467 U.S. 253, 269 n.18, 104 S. Ct. 2403, 2412 n.18 (1984) (stating that "outside the limited First Amendment context, a criminal statute may not be attacked as overbroad").

A criminal statute is vague if it fails to "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 358, 103 S. Ct. 1855, 1858 (1983); *Morales*, ___ U.S. at ___, 119 S. Ct. at 1857; *State v. Wilkins*, 655 S.W.2d 914, 915 (Tenn. 1983). The more important of these two factors is the presence of minimal guidelines to direct law enforcement. *Kolender*, 461 U.S. at 359, 103 S. Ct. at 1858; *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 532 (Tenn. 1993). "The degree of vagueness that the Constitution tolerates – as well as the relative importance of fair notice and fair enforcement – depends in part on the nature of the enactment." *Hoffman Estates*, 455 U.S. at 499, 102 S. Ct. at 1193. Criminal statutes are held to a higher standard of clarity than civil statutes due to the penalties involved. *Kolender*, 461 U.S. at 358-59 n.8, 103 S. Ct. at 1859 n.8; *Hoffman Estates*, 455 U.S. at 499-500, 102 S. Ct. at 1193; *Winters v. New York*, 333 U.S. 507, 515, 68 S. Ct. 665, 670 (1948). Nevertheless, the Supreme Court has warned:

> The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both

> general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited.

Colton v. Kentucky, 407 U.S. 104, 111, 93 S. Ct. 1953, 1957 (1972); *State v. Strickland*, 532 S.W.2d 912, 921 (Tenn. 1975).

Citing *Hoffman Estates*, 455 U.S. at 496, 102 S. Ct. at 1191, the state contends that a facial vagueness challenge is improper unless the statute is vague in all of its applications. The state argues that the proper analysis requires us to look first to the facts of the defendant's case, and if the statute clearly proscribes those facts, then the defendant cannot complain that the statute is vague with respect to other circumstances not existing in this case. *See Id.* The analysis advocated by the state directs that every inquiry into the facial vagueness of a statute be preceded by a successful "as applied" challenge to the statute's clarity.

The defendant contends that even if a statute clearly applies to certain conduct, the statute may be so fundamentally vague as a whole that it violates due process. She argues that independent of whether §§ 39-17-501 and -505 are clear in their prohibition of her video machines, these statutes are facially vague because they fail to guide law enforcement sufficiently as to what the legislature intended to proscribe. The defendant maintains that a party may successfully bring a facial vagueness challenge even when the statue is not vague in every application, citing *Springfield Armory, Inc. v. City of Columbus*, 29 F.3d 250, 251-52, 254 (6th Cir. 1994).

In *Springfield Armory*, gun manufacturers and dealers contended that an ordinance prohibiting assault weapons was facially vague. The ordinance defined assault weapons by listing a number of specific weapons and also prohibiting other weapons by the same manufacturer but with slight modifications or enhancements to the same action design. The court held the general part of the definition of assault weapons to be facially vague even though some of the parties possessed guns specifically named in the constitutionally sound portion of the definition. *Id.* at 252-54. The court criticized the district court for assessing the definition only as applied to the specific weapons presented at the evidentiary hearing without considering generally "whether a person of ordinary intelligence could make sense of" the definition. *Id.* at 254. The sixth circuit noted a discrepancy in United States Supreme Court cases regarding the correct approach to a facial vagueness challenge:

> At times the Court has suggested that a statue [sic] that does not run the risk of chilling constitutional freedoms is void on its face only if it is impermissibly vague in all its applications, *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495, 102 S. Ct. 1186, 1191, 71 L.Ed.2d 362 (1982), but at other times it has suggested that a criminal statute may be facially invalid even if it has some conceivable application. *Kolender v. Lawson*, 461 U.S. 352, 358-59 n.8, 103 S. Ct. 1855, 1859 n.8, 75 L.Ed.2d 903 (1983); *Colautti v. Franklin*, 439 U.S. 379, 394-401, 99 S. Ct. 675, 685-88, 58 L.Ed.2d 596 (1979).

Id. at 251-52. In this respect, we note that the most recent United States Supreme Court decision on the vagueness

of a criminal statute reveals a split among the justices over whether a statute is void for vagueness only if it is vague in all of its applications. *See Morales*, ___ U.S. at ___, 119 S. Ct. at 1857, 1857 n.22, 1866, 1870-7, 1886. Noting that criminal statutes are held to a stricter standard of clarity, the sixth circuit in *Springfield Armory* elected to approach the facial vagueness question by examining the law as a whole. 29 F.3d at 252-53.

In any event, the approach used by the Tennessee Supreme Court in determining whether a criminal law is unconstitutionally vague encompasses both a general evaluation of the statute in question and an examination of its application to a particular defendant. *See e.g., State v. King*, 973 S.W.2d 586, 590 (Tenn. 1998) (holding that the statute regarding jury instruction on the possible minimum sentence generally gives "explicit, objective, and unambiguous guidance sufficient to overcome any allegations of vagueness"); *Davis-Kidd Booksellers*, 866 S.W.2d at 532 (holding that the term "excess violence" is void for vagueness because it provides no guidance to sellers or officials); *State v. Lyons*, 802 S.W.2d 590, 593-94 (Tenn. 1990) (holding that terms within a statute prohibiting trespassing and disorderly conduct on school property were not vague and, thus, the statute as a whole was constitutional); *State v. Martin*, 719 S.W.2d 522, 525-26 (Tenn. 1986) (evaluating a statute regulating the display of adult literature and movies generally and then with regard to the defendant's particular facts); *Wilkins*, 655 S.W.2d at 916 (holding that the statute generally gives adequate notice); *State v. Thomas*, 635 S.W.2d 114 (Tenn. 1982) (holding that the statute defining aggravated rape was facially valid); *State v. Hinsley*, 627 S.W.2d 351, 354

(Tenn. 1982) (holding that the language of the habitual drug offender statute is generally clear enough to give notice and to set boundaries for the courts and police). Also, once the court has determined that the law is not vague in a general sense, it will not allow the defendant then to allege other factual situations beyond the defendant's own conduct in which the statute might be vague. *See State v. Tabor*, 678 S.W.2d 45, 46 (Tenn. 1984) (answering the defendant's contention that a statute prohibiting people from knowingly watching a cockfight could reach news reporters or investigators by noting that none of the defendants claimed to be such); *see also State v. Alcorn*, 741 S.W.2d 135, 139 (Tenn. Crim. App. 1987) (explaining that unless the defendant can show that the statute is generally vague, "the challenge is limited to the application of the statute to [the defendant's] own conduct"). The court has recognized that in the absence of a facial infirmity, "[i]t is not a proper function of a Court of last resort to envision in advance of application all possible contingencies of attempted prosecution under a criminal statute, and declare which are constitutional and which are not." *State v. King*, 635 S.W.2d 113, 114 (Tenn. 1982); *see also State v. Davis*, 654 S.W.2d 688, 694 (Tenn. Crim. App. 1983) (extending this provision to all appellate courts).

When examining a criminal statute for overbreadth or vagueness, we construe it according to the fair import of its terms. Tenn. Code Ann. § 39-11-104. The words of a statute should be interpreted in their ordinary sense and not be given a forced or subtle meaning. *Bowater North American Corp. v. Jackson*, 685 S.W.2d 637, 638-39 (Tenn. 1985). We apply the natural and common meaning of the language used. *State v. Williams*, 690 S.W.2d 517, 529

(Tenn. 1985); *State v. Logan*, 973 S.W.2d 279, 282 (Tenn. Crim. App. 1998). While a statute must give fair notice of the prohibited conduct, absolute precision or certainty is not required. *State v. McDonald*, 534 S.W.2d 650, 651 (Tenn. 1976). In analyzing the potential vagueness of a statute, we may look beyond the statutory language to judicial interpretations or legislative history to ascertain the clarity in meaning required by due process. *See Rose v. Locke*, 423 U.S. 48, 52, 96 S. Ct. 243, 245 (1975); *United States v. National Dairy Products Corp.*, 372 U.S. 29, 33-34, 83 S. Ct. 594, 598 (1963); *Wilkins*, 655 S.W.2d at 916. We are compelled to adopt a reasonable statutory construction that will preserve the constitutionality of the statute. *Lyons*, 802 S.W.2d at 592.

Tenn. Code Ann. § 39-17-505(a) provides:

> A person commits an offense who knowingly owns, manufactures, possesses, buys, sells, rents, leases, stores, repairs, transports, prints, or makes any gambling device or record. However, it is not an offense for a person to own or possess in this state a lottery ticket originating from a state in which a lottery is lawful, if such ticket is not owned or possessed for the purpose of resale.

Tenn. Code Ann. § 37-17-501(1) defines "gambling" as "risking anything of value for profit whose return is to any degree contingent on chance, but does not include a lawful business transaction." A "gambling device or record" is "anything designed for use in gambling, intended for use in gambling, or used for gambling." Tenn. Code Ann. § 39-17-501(3).

A. OVERBREADTH

The trial court concluded that the Tennessee statutes prohibiting the possession of a gambling device and defining the term "gambling device" were overly broad. The state argues that these statutes are not overbroad because they do not interfere with any constitutionally protected conduct or with First Amendment rights in particular. For First Amendment freedoms, the Supreme Court recognized an exception to the long standing rule that "constitutional rights are personal" and may not be asserted hypothetically with regard to others. *Broadrick*, 413 U.S. at 611-13, 93 S. Ct. at 2915-16. It made this exception because of the risk "that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Id.* Within this exception, it becomes increasingly difficult to deem the restricting statute overbroad as the protected activity moves from pure speech to expressive conduct. *Id.* at 616, 93 S. Ct. at 2917. In this respect, we believe that the possession of a gambling device enjoys no First Amendment protection, nor does it implicate any other constitutionally protected right. Thus, the overbreadth doctrine does not apply. *See, e.g., United States v. Hill*, 167 F.3d 1055, 1063 (6th Cir. 1999) (limiting analysis to whether Tennessee's definitions of "gambling" and "gambling device" are vague as applied to the defendant's specific facts because no First Amendment interests were threatened).

B. VAGUENESS

The defendant contends that the definition of a gambling device is vague both on its face and as applied because it fails to give fair notice of what items are covered by the statute and encourages arbitrary enforcement. The state contends that the definition is constitutionally sound because of the narrow application of the "designed for use in gambling" language. The state also argues that the defendant had fair notice that her machines were prohibited because gambling-theme video machines were gambling devices per se under the prior law.

1. Facial Challenge

The defendant contends that the plain language of the "designed for use" prong of the definition of a gambling device in § 39-17-501(3) fails to guide law enforcement as to what items fall within the definition. The state argues that the "designed for use in gambling" language is limited to devices that are designed principally for use in gambling as determined by their objective features. The state maintains that this construction of the "designed for use" prong gives fair notice of the meaning and scope of the statute and guards against arbitrary and discriminatory enforcement.

The United States Supreme Court has upheld the constitutionality of the phrase "designed for use." In *Hoffman Estates,* the Court analyzed a quasi-criminal ordinance requiring a business to obtain a license before it could sell any items "designed or marketed for use with illegal cannabis or drugs." The Court defined "design" as

to " 'fashion according to a plan,' " holding that "[i]t is therefore plain that the standard encompasses at least an item that is principally used with illegal drugs by virtue of its objective features, i.e., features designed by the manufacturer." *Hoffman Estates*, 455 U.S. at 502, 102 S. Ct. at 1195 (quoting *Webster's New International Dictionary of the English Language* 707 (2d ed. 1957)).

The same is true for a device designed for use in gambling. Whether a device is a gambling device by design turns upon whether the device is principally designed for use in gambling based upon the objective features that the manufacturer has incorporated into the device. This construction narrows the definition by limiting it to devices *principally* designed for gambling. It also provides guidance for determining the device's principal use by directing that we look to the device's objective features. The Attorney General has adopted this construction of the "designed for use" language in § 39-17-501(3), recognizing that the determination of whether an item is a gambling device depends "upon the particular aspects of the device, as it is designed to actually be played." Op. Att'y Gen. 94-129 (Nov. 2, 1994). Although we are not bound by the statutory constructions espoused by the Attorney General, our supreme court has recognized that the Attorney General's opinions are "entitled to considerable deference" because "government officials rely upon them for guidance." *State v. Black*, 897 S.W.2d 680, 683 (Tenn. 1995).

The defendant seeks to distinguish *Hoffman Estates* by arguing that the Court upheld the ordinance because the city attorney had issued guidelines which listed specific items covered by the ordinance. Although the Court

noted that the administrative guidelines delineated whether specific items were designed for use with illegal drugs, the Court framed its analysis in terms of the meaning of the word "design." *Hoffman Estates*, 455 U.S. at 502, 102 S. Ct. at 1194-95. The Court pointed out that both the ordinance and the guidelines contained ambiguities, "[n]evertheless, the *'designed for use' standard* is sufficiently clear to cover at least some of the items . . . sold." *Id.*, 455 U.S. at 503, 102 S. Ct. at 1195 (emphasis added). Thus, we believe that the Court relied upon its interpretation of the term "design" rather than depending exclusively upon the presence of the guidelines to hold that the ordinance was not unconstitutionally vague.

The defendant also argues that requiring that a device be designed principally for gambling as measured by its objective features gives no guidance as to what those features are. The law is well-settled that we read statutes relating to the same subject matter together. *State v. Williamson County Hosp. Trustees, et al*, 679 S.W.2d 934, 936 (Tenn. 1984). The definition of a gambling device in section -501(3) must be read together with section -501(1), which defines "gambling" as "risking anything of value for a profit whose return is to any degree contingent on chance." Thus, the devices covered by section -501(3) must have objective features that permit the risking of something of value for gain and that do so based upon chance rather than skill. In *State v. Strawberries, Inc.*, 473 N.W.2d 428 (Neb. 1991), the defendants argued that a Nebraska statute defining a "gambling device" as "any

device . . . used or usable for engaging in gambling"[1] was unconstitutional because virtually anything could be used for gambling. The Supreme Court of Nebraska held that the definition was constitutionally sound because the "bet" requirement in the definition of gambling[2] must be

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[1] Nebraska defines "gambling device" as follows:

> Gambling device shall mean any device, machine, paraphernalia, writing, paper, instrument, article, or equipment that is used or usable for engaging in gambling, whether that activity consists of gambling between persons or gambling by a person involving the playing of a machine. Gambling device shall also include any mechanical gaming device, computer gaming device, electronic gaming device, or video gaming device which has the capability of awarding something of value, free games redeemable for something of value, instant-win tickets which also provide the possibility of participating in a subsequent drawing or event, or tickets or stubs redeemable for something of value, except as authorized in the furtherance of parimutuel wagering. Supplies, equipment, cards, tickets, stubs, and other items used in any bingo, lottery by the sale of pickle cards, other lottery, raffle, or gift enterprise conducted in accordance with the [laws regulating bingo and lotteries] are not gambling devices within this definition.

Neb. Rev. Stat. § 28-1101(5).

[2] Nebraska defines "gambling" in pertinent part as follows:

> A person engages in gambling if he or she bets something of value upon the outcome of a future event, which outcome is determined by an element of chance, or upon the outcome of a game, contest, or election, or conducts or participates in any bingo, lottery by the sale of pickle cards, lottery, raffle, gift enterprise, or other scheme not authorized or

read into the definition of a gambling device. *Id.* at 437. Similarly, the requirements of value, profit and chance limit the devices that are designed for gambling under Tennessee law.

The defendant claims that the Attorney General's application of the principal design standard to souvenir dice in Opinion U90-169 obscures what conduct constitutes possession of a gambling device because it concludes that souvenir dice violate § 39-17-505. The opinion sets forth the principal design standard and states that:

> nothing in the objective features of ordinary dice [demonstrate] that they are designed principally for use in gambling, and it is well-known that dice are commonly used in various games which do not involve gambling. Of course, "shaved" or "loaded" dice *might* be said to be "designed for use in gambling," but ordinary dice would not constitute a "gambling device" in that sense.

> conducted in accordance with [laws regulating bingo and lotteries] . . . but, a person does not engage in gambling by:
>
> (a) Entering into a lawful business transaction;
>
> (b) Playing an amusement device or a coin-operated mechanical game which confers as a prize an immediate, unrecorded right of replay not exchangeable for something of value;
>
> (c) Conducting or participating in a prize contest; or
>
> (d) Conducting or participating in any bingo, lottery by the sale of pickle cards, lottery, raffle, or gift enterprise conducted in accordance with [laws regulating bingo and lotteries].

Neb. Rev. Stat. § 28-1101(4).

Op. Att'y Gen. U90-169 (Nov. 28, 1990) (emphasis added). We note that the opinion does not determine whether shaved or loaded dice are designed for use in gambling. Nevertheless, the opinon concludes that the souvenir dice are gambling devices because the hypothetical individual purchasing the dice knew that they were "originally" designed for use in gambling. Here the opinion departs from the principal use standard by focusing solely upon the particular intent of the manufacturer rather than the objective features of the dice. In this respect, the opinion does not state the law in Tennessee.

The defendant contends that the principal design standard results in arbitrary and capricious enforcement as evidenced by the differing positions of the state on whether dice or a deck of cards are gambling devices. The defendant claims that the state's position in this case that dice and cards are not gambling devices unless their possessor intends to use them to gamble or uses them to gamble contradicts the testimony of the state's witnesses at the preliminary and motion hearings. The defendant states that the state's expert, Agent Haynes, testified that dice and cards were inherently gambling devices and that Agent Marcias testified that he could arrest Kroger employees who stocked cards or dice for the possession of a gambling device. However, the defendant fails to mention that Agent Haynes qualified his statement, saying that a gambling device must include the element of risk found in the definition of gambling and that dice alone are not a gambling device.[3]

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[3] Interestingly, although Mr. McClanahan, the defense expert, deemed that dice and cards were designed for use in

Agent Marcias stated that cards and dice could be gambling devices in the "right setting" before giving his belief that he could arrest grocery employees for stocking these items under § 39-17-505. However, we believe that Agent Marcias's statement that individuals who transported, stocked or touched a deck of cards at a grocery store have violated section -505 was erroneous because it did not take the principal design standard into account. A deck of cards or a pair of dice may be used to play numerous games with no connection to gambling. The objective features of the cards or the dice in no way make them particularly suited for risking something of value for gain based upon chance. Agent Marcias' recognition that cards and dice could be gambling devices in the right context properly reflects that an individual could use them to gamble or could intend to use them to gamble even though that is not their principal use. Such a finding under the intent or use prongs of the definition would depend upon the surrounding facts rather than the features of the dice or cards themselves. Agent Marcias' mistaken beliefs about the limits of his authority do not require us to conclude that the definition of a gambling device fails to give sufficient guidance to law enforcement. In any event, this opinion will serve to guide law enforcement officers in the future application of the "designed for use" language within the statute. *See*

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gambling, he believed that the defendant's six gambling-theme video machines, equipped with knock-off switches and retention meters, were purely amusement devices.

Wilkins, 655 S.W.2d at 916 (recognizing that judicial interpretations may refine the meaning of a statute so that it comports with due process).

2. As Applied

We also hold that § 39-17-501(3) gives the defendant fair notice of whether her video machines constitute gambling devices because, in addition to falling within the plain language of the "designed for use" prong, similar gambling-theme video machines were gambling devices per se under the prior law. The pre-1989 gambling statutes defined a gambling device as follows:

> [A]ny article, device or mechanism by the operation of in any place in which a right to money, credits, deposits or other things of value may be credited, in return for a consideration, as the result of the operation of an element of chance; any article, device or mechanism which, when operated for a consideration does not return the same value or thing of value for the same consideration upon each operation thereof; any device, mechanism, furniture, fixture, construction or installation designed primarily for use in connection with professional gambling; and any subassembly or essential part designed or intended for use in connection with any such device, mechanism, furniture, fixture, construction or installation.
>
> This definition shall not include any coin-operated game or device designed and manufactured for bona fide amusement purposes only, which may, by application of skill, entitle the player to replay the game or device at no additional cost if:

> (A) The game or device accumulates and reacts to no more than fifteen (15) free replays;
>
> (B) Discharges accumulated free replays only by reactivating the game or device for one (1) additional play for each accumulated free replay; and
>
> (C) Makes no permanent record, directly or indirectly, of free replays.

Tenn. Code Ann. § 39-6-601(4) (repealed 1989). Under this definition, the court of appeals held video card games to be gambling devices per se. *Bracker v. Estes*, 698 S.W.2d 637, 643 (Tenn. Ct. App. 1985) (holding a video machine that simulated a five-card-draw poker game and allowed a player to accumulate up to 999 replays was a gambling device). The court applied this holding to coin-operated video games that "accumulated and reacted to more than fifteen free replays, that . . . discharged the accumulated free replays more than one at a time, and that . . . made a permanent record of the free replays." *T & W Enterprises v. Casey*, 715 S.W.2d 356, 358-59 (Tenn. Ct. App. 1986). Agent Haynes testified that the defendant's video machines allowed a player to accumulate up to twenty thousand credits and to risk eight to sixty-four credits per play. He also stated that the machines had a meter that retained the total number of credits run off the machine.

The legislature amended the gambling statutes in 1989. The defendant contends that case law under the prior act is of no use in giving fair notice of what devices are designed for use or intended for use in gambling under the current act. However, the Sentencing Commission Comments to § 39-17-501 state:

> This section contains the definitions for gambling offenses. The definitions are intentionally broader than those found in prior law. The commission intends to include any scheme by which value is risked upon a chance for greater value as a "gambling" offense. The definition of "gambling" includes lotteries, chain or pyramid clubs, numbers, pinball, poker or any as yet unnamed scheme where value is risked for profit.

We note that the legislature approved the publication of the Sentencing Commission Comments to the 1989 revisions to the criminal code. *See* 1989 Tenn. Pub. Acts, ch. 591, § 114. Thus, we will view the comments as evidence that the legislature intended the definition of a gambling device to be broader under the current gambling law. *See Sutherland Statutory Construction* § 48.09 (5th ed. 1992); *see also State v. Horton*, 880 S.W.2d 732, 735 (Tenn. Crim. App. 1994). This broader definition necessarily includes what was formerly covered. We also note that a device that is "designed for use in gambling" under the principal design standard is the equivalent of a gambling device per se, as such a device was recognized under prior law.

Citing to *State v. Horton*, the defendant contends that the very fact that the legislature repealed the prior act means it did not want the courts or law enforcement to continue to rely on the prior law. In *Horton*, this court held that circumstances found to implicate a prior law cannot be extended to a new law when such circumstances contravene the language of the new statute:

> [T]he state's construction ignores the language of the present statute as it is written. Regardless of whether the legislature intended to include

> all of the circumstances provided in the 1982 Sentencing Act in the present statute, we cannot enlarge the statute beyond the fair meaning of the language it contains nor can we ignore the fact that the language differs materially from that in the former statute.

880 S.W.2d at 736 (holding that the Sentencing Commission Comments failed to indicate adequately the legislative intent and that the construction advocated by the state contravened the plain meaning of the language used). We do not believe the inclusion of video machines, which were gambling devices per se under the prior definition, strains the meaning of the language in the now broader definition, "anything designed for use in gambling."

The defendant argues that the comments may mean that only the definition of "gambling" is broader under the new act. However, the comments expressly state that the "definitions" are broader. The defendant also suggests that even if the definition of gambling device is now broader, we do not know how much broader the legislature intended it to be. We do not need to know the exact perimeter of the new definition in order to conclude that a device that was a gambling device per se under the prior definition unquestionably falls within the new broader definition. Because a reasonable person would understand that a video machine deemed a gambling device per se under the prior law would also fall within the broader definition of a gambling device under the current law, the definition of gambling is constitutionally sound as applied to the defendant in this case.

The defendant contends that gambling-theme video games are subject to arbitrary and discriminatory prosecution as evidenced by the differing determinations of law enforcement officials on whether these machines are designed for use in gambling. She claims that the state's position that gambling-theme video games continue to be per se gambling devices under the 1989 act conflicts with the 1992 testimony of John Carney, the former director of the Tennessee Bureau of Investigation. Then Director Carney and one of his agents testified before a joint committee of the legislature regarding the possible regulation and licensing of gambling-theme video machines. Both Director Carney and Agent Slagel stated that gambling-theme video machines must be played and that the player must receive payment for credits won before these machines would be gambling devices under the 1989 act. Coincidentally, Mr. Carney is now a District Attorney General and prosecuted this case against the defendant at the trial level. The defendant claims that Mr. Carney's apparent change in interpretation of § 39-17-501(3) provides a perfect example of the potential for arbitrary and discriminatory enforcement under the statute. We believe that an incorrect interpretation of a statute by a law enforcement officer does not mandate that the statute fails to provide adequate guidance for fair enforcement.

Although the defendant claims that the definition of a gambling device fails to provide adequate guidance for law enforcement with respect to gambling-theme video games, the facts of this case belie that conclusion. Both Agent Haynes and Agent Marcias determined that the defendant's machines were gambling devices based upon their objective features. Agent Marcias testified that he

thought the defendant's machines were gambling devices because they had knock-off switches and lacked amusement stickers. Agent Haynes said he believed the machines were gambling devices because the games took an inordinately short time to play in relation to the amount of money required to play, the machines had knock-off switches, each machine had a meter which retained the credits run off the machine, and, importantly, the games required no skill. We believe the testimony of these witnesses illustrates that the current gambling statutes adequately inform law enforcement as to whether gambling-theme video machines continue to fall within the definition of a gambling device.

3. Lawful Business Transaction Exception

Finally, the defendant contends that the exception for lawful businesses in the definition of gambling is unconstitutionally vague. Tenn. Code Ann. § 39-17-501(1) excepts lawful business transactions from the definition of gambling. Section -501(4) provides that a lawful business transaction "includes any futures or commodities trading." The defendant contends that the exception fails to indicate what lawful conduct, other than futures and commodities trading, is accepted. Therefore, the defendant argues that arbitrary and discriminatory enforcement is inevitable and that the average citizen has no basis for determining whether his or her business transactions are prohibited.

"Lawful" means "conformable to law: allowed or permitted by law: enforceable in a court of law: legitimate" or "constituted, authorized, or established by law:

rightful." *Webster's Third New International Dictionary* 1279 (3d ed. 1993). The plain meaning of section -501(1) reveals that a transaction that might otherwise come within the definition of gambling because value is ventured for a profit contingent upon chance is excluded if that transaction conforms to the law in all other respects. *See* Op. Att'y Gen. 99-030 (Feb. 18, 1999) (noting that the lawful business transaction exception provides "clear evidence that the legislature did not intend to reach conduct otherwise permitted by law, even if that conduct might fit the statutory definition" of gambling). Possession of a gambling device does not otherwise conform with the law because it violates § 39-17-505.

Our supreme court has addressed the question of whether the term "lawful order" in a trespass statute was unconstitutionally vague. *Lyons*, 802 S.W.2d at 590. In *Lyons*, the defendant argued that "lawful order" was undefined and lacked any specific guideline. The court held:

> The term "lawful order" while general in nature is not vague. The concept of "lawfulness" is not inherently unconstitutionally vague, and "people of common intelligence need not always guess at what a statute means by 'lawful' " inasmuch as that term must be considered in the context of the statements of law contained in relevant statutes and court rulings.

Id. at 592 (quoting *State v. Smith*, 759 P.2d 372, 375 (Wash. 1988)). The legislature did not need to list all of the transactions that could fall within the legal business transactions exception. A person is presumed to know which transactions are lawful. *See, e.g., State ex. rel Davis*

v. Thomas, 88 Tenn. 491, 494, 12 S.W. 1034, 1035 (1890) (presuming that an individual knows the law); *Hunter v. State*, 158 Tenn. 63, 73, 12 S.W.2d 361, 363 (1928) (holding that ignorance of the law will not excuse a crime). Thus, the defendant's argument that the average individual will not be able to distinguish lawful business transactions from gambling is erroneous. The definition of gambling is not unconstitutionally vague.

II. EQUAL PROTECTION

The defendant contends that the exception for lawful business transactions violates her right to equal protection under the law. She argues that this exception creates a class of people, those engaging in lawful business transactions including futures and commodities traders, who are permitted to venture something of value for a profit contingent upon chance without risking incarceration. She maintains that such a distinction impinges upon her fundamental right to personal liberty. She argues that, therefore, the statute is subject to strict scrutiny. She claims that the statute cannot meet this standard because the unlawful business transaction exception is not narrowly tailored to effectuate a compelling state interest. The state contends that the exception for lawful business transactions does not bear upon any fundamental rights and reasonably relates to a legitimate state interest.

The Fourteenth Amendment to the United States Constitution prohibits a state from denying the equal protection of the law to anyone within its jurisdiction. Equal protection, as guaranteed under Article I, Section 8 and Article XI, Section 8 of the Tennessee Constitution, is

essentially the same as that afforded by the federal constitution. *State v. Tester,* 879 S.W.2d 823, 827 (Tenn. 1994); *Tennessee Small School Systems v. McWherter,* 851 S.W.2d 139, 152 (Tenn. 1993). "Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made." *Baxstrom v. Herold,* 383 U.S. 107, 113, 86 S. Ct. 760, 763 (1966). In the absence of a suspect classification, such as race, or of an intrusion upon a fundamental constitutional right, the challenged classification must "bear some rational relationship to legitimate state purposes." *San Antonio Indep. Sch. Dist. v. Rodreguez,* 411 U.S. 1, 40, 93 S. Ct. 1278, 1300 (1973). However, if the classification "disadvantages a 'suspect class' or impinges upon the exercise of a 'fundamental right,' the legislative classification is subject to strict scrutiny by the courts" and must satisfy a compelling state interest. *Doe v. Norris,* 751 S.W.2d 834, 841 (Tenn. 1988).

No suspect classification is involved in this case. The defendant argues that her fundamental right to personal liberty is implicated because, unlike those who fall within the lawful business transaction exception, she risks incarceration for risking something of value for a profit contingent upon chance. The right to personal liberty is a fundamental right, *Id.* at 841-42, but it is not the right restricted by § 39-17-501 et seq. These statutes prohibit gambling, which enjoys no constitutional protection. *See State v. Alcorn,* 741 S.W.2d 135, 139 (Tenn. Crim. App. 1987) (holding that although a convicted individual would be deprived of his or her liberty, the statute in

question prohibits the sale of illegal drugs, which is not a fundamental right).

The legislature has the right to determine what conduct to criminalize. *Hinsley,* 627 S.W.2d at 355. Every criminal law creates classifications. "A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill." *Phyler v. Doe,* 457 U.S. 202, 216, 102 S. Ct. 2382, 2394 (1982); *Doe,* 751 S.W.2d at 841. If the defendant's reasoning were valid, every criminal statute would be subject to strict scrutiny when the resulting sentence restricted a defendant's liberty. Instead, we reserve strict scrutiny for those statutes with subject matter that impinges upon a fundamental right. *See, e.g., Doe,* 751 S.W.2d at 842 (holding that the practice of the Tennessee Department of Correction of detaining unruly juveniles in secure facilities with delinquent juveniles impinged upon the liberty rights of the unruly juveniles); *Campbell v. Sundquist,* 926 S.W.2d 250, 262 (Tenn. Ct. App. 1996) (holding that a criminal statute prohibiting consensual sex between adults of the same gender implicated the fundamental right to privacy). Such is not the case with respect to the definition of gambling.

The defendant relies upon *State v. Crain,* 972 S.W.2d 13 (Tenn. Crim. App. 1998), to support her contention that criminal statutes that create classes of individuals are subject to strict scrutiny. However, we respectfully believe that *Crain* applied the wrong standard. In *Crain,* the nineteen-year-old defendant claimed that a statute

punishing eighteen- to twenty-one year olds for driving with a blood alcohol content of .02 percent while not punishing adults over age twenty-one for the same conduct deprived him of equal protection under the law. The court cited *Doe* for the proposition that personal liberty is a fundamental right. *Id.* at 16. The court then held that because public service work was a possible sanction under the statute, the statute impinged upon personal liberty, thereby requiring strict scrutiny. *Id.* at 16. The *Crain* court failed to account for the distinction in *Doe* that the practice of housing the two classes of juveniles together which was authorized by statute was the focus of the challenge, not whether the legislature could prescribe certain restrictions for unruly juveniles while not so restricting the average juvenile. Because the right of an eighteen-to twenty-one year old to drive with a blood alcohol content of .02 is not a fundamental right, the legislature's decision to criminalize this conduct with respect to this age group while not criminalizing the same conduct for those over twenty-one should have been examined under the rational basis test.

Thus, we will look to whether a rational basis supports the distinction between gambling and a lawful business transaction. "[I]f some reasonable basis can be found for the classification, or if any state of facts may reasonably be conceived to justify it, the classification will be upheld." *Tennessee Small School Systems,* 851 S.W.2d at 153. The state has a legitimate interest in regulating business transactions. The legislature "cannot prohibit an ordinary business but it may, however, regulate the business to promote the health, safety, morals or general welfare of the public." *Ford Motor Co. v. Pace,* 206 Tenn. 559, 564, 335

S.W.2d 360, 362 (1960). The prohibition of gambling is within the state's police power. *Ah Sin v. Wittman,* 198 U.S. 500, 505-06, 25 S. Ct. 756, 758 (1905). Our supreme court has recognized that the legislature may proscribe the possession of gambling devices in order to preserve public morals. *Motlow v. State,* 125 Tenn. 547, 568, 145 S.W. 177, 182 (1912). The legislature's clarification that lawful transactions containing an element of chance are to be distinguished from those activities which constitute gambling is rationally related to the state's legitimate interests in prohibiting gambling and regulating business to preserve public morals. The exception for lawful business transactions is constitutionally sound.

Based upon the foregoing and the record as a whole, we reverse the trial court's dismissal of the indictment and remand the case for reinstatement of the indictment and for further proceedings.

/s/ Joseph M. Tipton
Joseph M. Tipton, Judge

CONCUR:

/s/ James Curwood Witt, Jr.
James Curwood Witt, Jr., Judge

/s/ John Everett Williams
John Everett Williams, Judge

IN THE CIRCUIT COURT
FOR MONTGOMERY COUNTY
19TH JUDICIAL DISTRICT, CLARKSVILLE, TENNESSEE

STATE OF TENNESSEE,	)	
	)	
v.	)	
	)	
RHONDA BURKHART,	)	No. 38568
	)	
Defendant.	)	
	)	

JUDGMENT OF DISMISSAL OF INDICTMENT

(Filed Mar. 18, 1998)

This criminal case came before the Court, the Hon. John H. Gasaway, III, presiding, on Defendant Rhonda Burkhart's *Motion to Dismiss Indictment and to Declare Portions of Tennessee Code Annotated Title 39, Chapter 17, Part 5 Unconstitutionally Void for Overbreadth, Vagueness, and for Denial of Equal Protection of Law* and associated *Supplemental Memorandum* on January 9, 1998. On January 9, 1998 the Court entertained testimony from the witnesses presented on behalf of the parties. The State requested additional time to provide further evidence or argument which the Court granted. Trial of this criminal case was scheduled for January 29, 1998. The State was allowed through January 16, 1998 within which to present further testimony from witnesses or an expert witness or present other testimony as the State determined appropriate. The State elected to waive submission of further evidence and submitted a written memorandum with case law for consideration by the Court. Counsel for the State and the Defendant waived further argument on the

case. On January 28, 1998 the Court announced the following decision in open Court.

The Court having carefully considered the arguments of counsel, the written briefs, case law and supplemental Memorandum of the parties, the evidence submitted, the testimony of the witnesses, the argument of Counsel, the indictment and the entire record as a whole, and having carefully considered the code section challenged by the Defendant, Tennessee Code Annotated § 39-17-505, and the Court having determined that application of the definitions set forth at Tennessee Code Annotated §§ 39-17-501 regarding "gambling devices" and "gambling" and the resulting application of Tenn Code Ann § 39-17-505 is so overly broad and unduly vague in proscribing "gambling devices" that application of the criminal statute Tennessee Code Annotated § 39-17-505 constitutes a denial of equal protection of law and due process guaranteed citizens under the Constitution of the United States and the Constitution of the State of Tennessee such that prosecution of [sic] under this statute is constitutionally prohibited.

Based upon the foregoing it is appropriate that the pending one count indictment brought pursuant to Tennessee Code Annotated § 39-17-505 against Defendant Rhonda Burkhart be dismissed with prejudice.

The foregoing being the decision of the Court it is,

SO ORDERED.

ENTERED this 18th day of March, 1998.

/s/ John H. Gasaway, III
HON. JOHN H. GASAWAY, III
Circuit Court Judge

APPROVED FOR ENTRY:

/s/ Mark R. Olson
MARK R. OLSON #11630
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114 Franklin Street
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(931) 648-1517
Attorney for Defendant Rhonda Burkhart

CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing Order has [sic] hand delivered to Hon. Dan Brollier, Assistant District Attorney General, 204 Franklin Street, Suite 200, Clarksville, Tennessee 37040 and to the ATTORNEY GENERAL & REPORTER, 450 James Robertson Parkway, Nashville, Tennessee 37243-0493 on the date set forth below:

DATE: 2/9/1998

/s/ Mark R. Olson
MARK R. OLSON

Opinion No. 94-129-1994 Tenn. AG LEXIS 142

OFFICE OF THE ATTORNEY GENERAL OF TENNESSEE

94-129

1994 Tenn. AG LEXIS 142

November 2, 1994

Legality of Redesigned Gaming Machines in Mock Casino

QUESTION

Whether redesigned slot and video machines and other casino type equipment constitute "gambling devices" within the meaning of Tenn. Code Ann. § 39-17-501(3)?

OPINION

These redesigned machines would constitute gambling devices if they are designed for, used for, or intended for use in gambling.

ANALYSIS

This opinion request involves a proposed mock casino which is described as follows:

In this mock casino would be redesigned machines and equipment such as video and slot machines, tables, roulette wheels and dice. An admission would be charged for entry to the casino. Upon paying the admission

charge, patrons would be given tokens. They may use these tokens to play the various casino games or keep them as souvenirs.

The Requestor posited that "the patrons would play the casino games for amusement only as they could not win anything of value or lose anything."

Possession of a "gambling device" is prohibited by Tenn. Code Ann. § 39-17-505. "Gambling device" is defined in Tenn. Code Ann. § 39-17-501(3) as "anything that is designed for use in gambling, intended for use in gambling, or used for gambling". Under this definition, a device will be considered a gambling device if it is **either** designed for use in gambling **or** intended for us in gambling **or** used for gambling. Consequently, proof of any of the listed features of design, intent or use will suffice to establish a device as a gambling device.

The question of whether a particular device is "designed for use in gambling" by the manufacturer depends upon whether it is designed principally for use in gambling as gauged by the objective features incorporated into the device by its manufacturer. As for "designed for use in gambling", this definition is purposefully broad. It includes devices that are designed principally or primarily for gambling, not just those designed exclusively for illicit purposes. **See generally** Sentencing Commission Comments to § 39-17-501. Drug paraphernalia laws and ordinances in several states, including Tennessee, use the phrase "designed for use". **See** Tenn. Code Ann. § 39-17-402(12). It is in this context that the plain meaning of "designed for use" has been held to encompass "at least an item that is principally

used with illegal drugs by virtue of its objective features, i.e. features designed by the manufacturer". **Hoffman Estates v. Flipside, Hoffman Estates**, 455 U.S. 489, 501, 102 S.Ct. 1185, 1195 (1982). The Supreme Court also held that the term expressly refers to the manufacturer's design of a device, not the intent of a retailer or customer. **Id.** 102 S.Ct. at 1195. Other state courts have adopted the **Hoffman Estates** definition. **See e.g., State v. Munson**, 714 S.W.2d 515 (Mo. 1986); **State v. Newman**, 108 Idaho 5, 696 P.2d 856 (1985); **City of Whitehall v. Ferguson**, 14 Ohio App. 3d 434, 471 N.E.2d 838 (1984).

Applying similar construction to § 39-17-501(3), the phrase "designed for use in gambling" includes any devices that are designed principally for use in gambling, such design to be gauged by the objective features incorporated into the device by its manufacturer. Consequently, the question of whether a particular device is "designed for use in gambling" by the manufacturer would turn upon the particular aspects of the device, as it is designed to actually be played.

In order to determine whether a device is "intended for use" in gambling, one must look to the intent or conduct of a particular defendant. Standing alone, without a potential defendant intending to use it in an illicit way, a device cannot itself intend to be a gambling device.

In order to determine whether the redesigned machines and other casino equipment are actually "used for gambling," one must first determine whether playing those machines constitutes "gambling". Gambling is prohibited by Tenn. Code Ann. § 39-17-502, and is defined as

"risking anything of value for a profit whose return is to any degree contingent on chance, but does not include a lawful business transaction". Tenn. Code Ann. § 39-17-501(1). "Profit" is defined as "anything of value in addition to the gambling bet". Tenn. Code Ann. § 39-17-501(6).

The facts set forth in the request do not specify whether players are able to obtain additional tokens or "free plays" if they are successful at the games. If so, a court would probably find that they had received something of value, or a "profit".

The Tennessee Supreme Court has held that the ability to obtain "free plays" is a "thing of value" for purposes of gambling. In **Heartley v. State**, 178 Tenn. 254, 157 S.W.2d 1 (1941), the court considered whether a mint-vending machine was a gambling device. The machines looked like ordinary slot machines and when a customer placed a nickel in the machine, he or she received, in addition to a package of mints, a varying number of free plays. 178 Tenn. at 257. The court held that the right to continue operation of the machine for amusement after receiving a package of mints was a thing of value within the statutes against gaming. 178 Tenn. at 259. **See also Painter v. State**, 163 Tenn. 627, 45 S.W.2d 70 (1931) (court held mint-vending machines which delivered a varying number of chips for playing a game on the machine, along with a package of mints, were gambling devices); **State ex rel. Manchester v. Marvin**, 233 N.W. 486 (Iowa 1930) (mint-vending machines are gambling devices); **Harvie v. Heise**, 148 S.E. 66 (S.C. 1929) (mint-vending machines are gambling devices); **Rankin v. Mills Novelty Co.**, 32 S.W.2d 161 (Ark. 1930) (mint-vending machines

are gambling devices); and **Green v. Hart**, 41 F.2d 855 (D. Conn. 1930) (mint-vending machines are gambling devices).

Accordingly, a court would probably find that the awarding of "free plays" or additional tokens to successful players constitutes a "thing of value" under the statutory definition of "profit". The "thing of value" that is risked within the definition of "gambling" would be the admission fee for which the patron receives tokens to use in the games; and the "chance" is the possibility that a player may win or lose one of the games in the mock casino. Under these circumstances, a trier of fact would likely find that the playing the games in the mock casino would constitute "gambling". Therefore, a court would probably find that the redesigned machines and other equipment in the mock casino constitute "gambling devices".

Given a particular device, the ultimate decision whether to prosecute under the criminal statutes falls within the responsibility of the appropriate district attorney general and, as in any criminal case, the ultimate determination whether the statutes have been violated is within the province of the trier of fact.

Requested by: The Honorable Larry Huskey, State Representative, 219 War Memorial Building, Nashville, Tennessee 37243-0112

CHARLES W. BURSON, Attorney General and Reporter (MICHAEL E. MOORE, Solicitor General; STEVEN A. HART, Deputy Attorney General)

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
450 JAMES ROBERTSON PARKWAY
NASHVILLE, TENNESSEE 37243-0485

November 28, 1990

OPINION NO. U90-169

Souvenir Dice as Gambling Devices

QUESTIONS

1. Do souvenir dice, purchased legally in another state with the knowledge that they were originally designed for used for gambling, intended for use in gambling, and had been used for gambling, constitute "gambling device[s] or record[s]" under Tenn. Code Ann. § 37-17-501(3)?

2. If so, is the purchaser who possesses the dice in this state in violation of Tenn. Code Ann. § 37-17-505, possession of a gambling device or record?

3. Does the answer to either question 1 or 2 differ if there is proof that the purchaser did not intend to use the dice for gambling in Tennessee?

OPINIONS

1. Yes. Souvenir dice, purchased legally in another state with the knowledge that they were originally designed for use in gambling, intended for use in gambling, and had been used for gambling would constitute a "gambling device" within the meaning of Tenn. Code Ann. § 39-17-501(3) (1990 Supp.).

2. Yes. If the possessor of souvenir dice knows that the device were originally designed for use in gambling, intended for use in gambling, and had been used in gambling, the person would be in violation of § 39-17-505(a).

3. Yes. The intent of the possessor of souvenir dice would be relevant on the issue of whether the dice constituted a device intended for use in gambling.

ANALYSIS

1. A "gambling device or record" means anything designed for use in, intended for use in, or used for gambling. Tenn. Code Ann. § 39-17-501(3) (1990 Supp.). "Gambling" means risking anything of value for a profit whose return is to any degree contingent on chance, but does not include a lawful business transaction. Tenn. Code Ann. § 39-17-501(1). "Profit" means anything of value in addition to the gambling bet. Tenn. Code Ann. § 39-17-501(5). "Gambling bet" means anything of value risked in gambling. Tenn. Code Ann. § 39-17-501(2).

Under these definitions, a device constitutes a gambling device when designed to be used, intended to be used, or actually used for "gambling", the risking of value for a profit contingent on chance. Such a device constitutes a gambling device per se when designed to be used for gambling. Whether a device is intended for use in or actually used for gambling must be determined by specific proof of the intent or conduct of a defendant. Standing alone, without a potential defendant intending to or actually using it in some illicit way, a device cannot intend itself to be or operate itself as a gambling device.

However, it may be designed for use in gambling and, in those cases, it is a gambling device regardless of a putative defendant's intent or action.

For example, one plays a slot machine by inserting a coin and pulling a handle, which sets in motion the symbols inside of the machine. A certain alignment of designated symbols within the machine prompts a payment to the player of a profit, more coins than he or she used to operate the machine. A random alignment or symbols returns nothing to the player. Pure chance determines which alignment of symbols the machine produces. *Keaton v. State*, 212 Tenn. 690, 695, 372 S.W.2d 163, 165 (1963). Because such a machine is designed exclusively for gambling and has no lawful or innocent purpose, it is a gambling device *per se*.

The phrase "designed for use in gambling" is purposefully broad, and it includes devices that are designed principally or primarily for gambling, not just those designed exclusively for illicit purposes. *See generally* Sentencing Commission Comments to § 39-17-501 (1990 Supp.). Drug paraphernalia laws and ordinances in several states, including Tennessee, use the phrase "designed for use." *See* Tenn. Code Ann. § 39-17-402(12) (1990 Supp.). It is in this context that the plain meaning of "designed for use" has been held to encompass "at least an item that is *principally* used with illegal drugs by virtue of its objective features, i.e., features designed by the manufacturer." *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 501, 102 S.Ct. 1186, 1195 (1982) (emphasis added). The Supreme Court also held that the term expressly refers to the manufacturer's design of a device, not the intent of a retailer or customer. *Id.*, 102

S.Ct. at 1195. Other state courts have adopted the *Hoffman Estates* definition. *See, e.g., State v. Munson*, 714 S.W.2d 515 (Mo. 1986); *State v. Newman*, 108 Idaho 5, 696 P.2d 856 (1985); *City of Whitehall v. Ferguson*, 14 Ohio App.3d 434, 471 N.E.2d 838 (1984).

Applying a similar construction, the phrase "designed for use in gambling" includes any devices that are designed principally for use in gambling, such design to be gauged by the objective features incorporated into the device by its manufacturer. There is nothing in the objective features of ordinary dice demonstrating that they are designed principally for use in gambling, and it is well-known that dice are commonly used in various games which do not involve gambling. Of course, "shaved" or "loaded" dice might be said to be "designed for use in gambling", but ordinary dice would not constitute a "gambling device" in that sense.

Your inquiry posits that the souvenir dice in question originally were designed for use in gambling, were intended for use in gambling, and were used for gambling. Accordingly, by definition these souvenir dice would constitute a "gambling device" within the meaning of Tenn. Code Ann. § 39-17-501(3) (1990 Supp.).

2. Section 39-17-505(a), Tennessee Code Annotated, provides:

> A person commits an offense who knowingly owns, manufactures, possesses, buys, sells, rents, leases, stores, repairs, transports, prints or makes any gambling device or record.

Since under § 39-17-501(3) the souvenir dice in question constitute a "gambling device", the knowing possession

of the dice in this state would constitute a violation of § 39-17-505(a). Under Tennessee law, "knowing" refers to an individual who acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result. Tenn. Code Ann. § 39-11-302(b) (1990 Supp.). Under the circumstances you posit, where the possessor knows that the dice were originally designed for use in gambling, intended for use in gambling, and had been used in gambling, the person would be in violation of § 39-17-505(a).

3. Whether a device is designed for use in gambling is a matter which depends upon the manufacturer's design and not the intent of the retailer or customer. Therefore, the intent of the purchaser of such a device is irrelevant. Whether a device is actually used for gambling does not depend upon the intent of the defendant. However, whether a device is intended for use in gambling depends upon the intent of the defendant and in a prosecution under § 39-17-505 for possession of such a device the State would have to prove that a defendant intended to use the device in gambling. Therefore, if the purchaser of souvenir dice did not intend to use the dice for gambling in Tennessee, it is doubtful that a prosecution under

§ 39-17-505 for possession of such a device could be successful.

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TENNESSEE CODE ANNOTATED
TITLE 39 CRIMINAL OFFENSES
CHAPTER 17 OFFENSES AGAINST PUBLIC HEALTH, SAFETY AND WELFARE
Part 5 – Gambling

§ 39-17-501 Definitions.

As used in this part, unless the context otherwise requires:

(1) "Gambling" means risking anything of value for a profit whose return is to any degree contingent on chance, but does not include a lawful business transaction;

(2) "Gambling bet" means anything of value risked in gambling;

(3) "Gambling device or record" means anything designed for use in gambling, intended for use in gambling, or used for gambling;

(4) "Lawful business transaction," as used in subdivision (1), includes any future or commodities trading;

(5) "Lottery" means the selling of anything of value for chances on a prize or stake; and

(6) "Profit" means anything of value in addition to the gambling bet.

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§ 39-17-505 Possession of gambling device or record – Forfeiture.

(a) A person commits an offense who knowingly owns, manufactures, possesses, buys, sells, rents, leases, stores, repairs, transports, prints or makes any gambling device or record. However, it is not an offense for a person to own or possess in this state a lottery ticket originating from a state in which a lottery is lawful, if such ticket is not owned or possessed for the purpose of resale.

(b)(1) Any gambling device or record is contraband and shall be subject to seizure, confiscation and forfeiture in accordance with the provisions of the general forfeiture statute, codified in § 39-11-116 [repealed].

(2) After a gambling device or record has been forfeited to the state pursuant to § 39-11-116 [repealed], the court hearing the criminal charges resulting in the forfeiture shall order the destruction of such device or record. If the district attorney general or law enforcement agency does not believe that a gambling device or record should be destroyed in a particular case, the district attorney

general shall petition the court for a[illegible]ernate disposition of such record or device. If the court finds that the proposed alternate disposition reasonably ensures that the device will not be used in an unlawful manner in this state, the court may grant such petition and order the disposition of the device or record in accordance with the petition.

(c) Possession of a gambling device or record is a Class B misdemeanor.